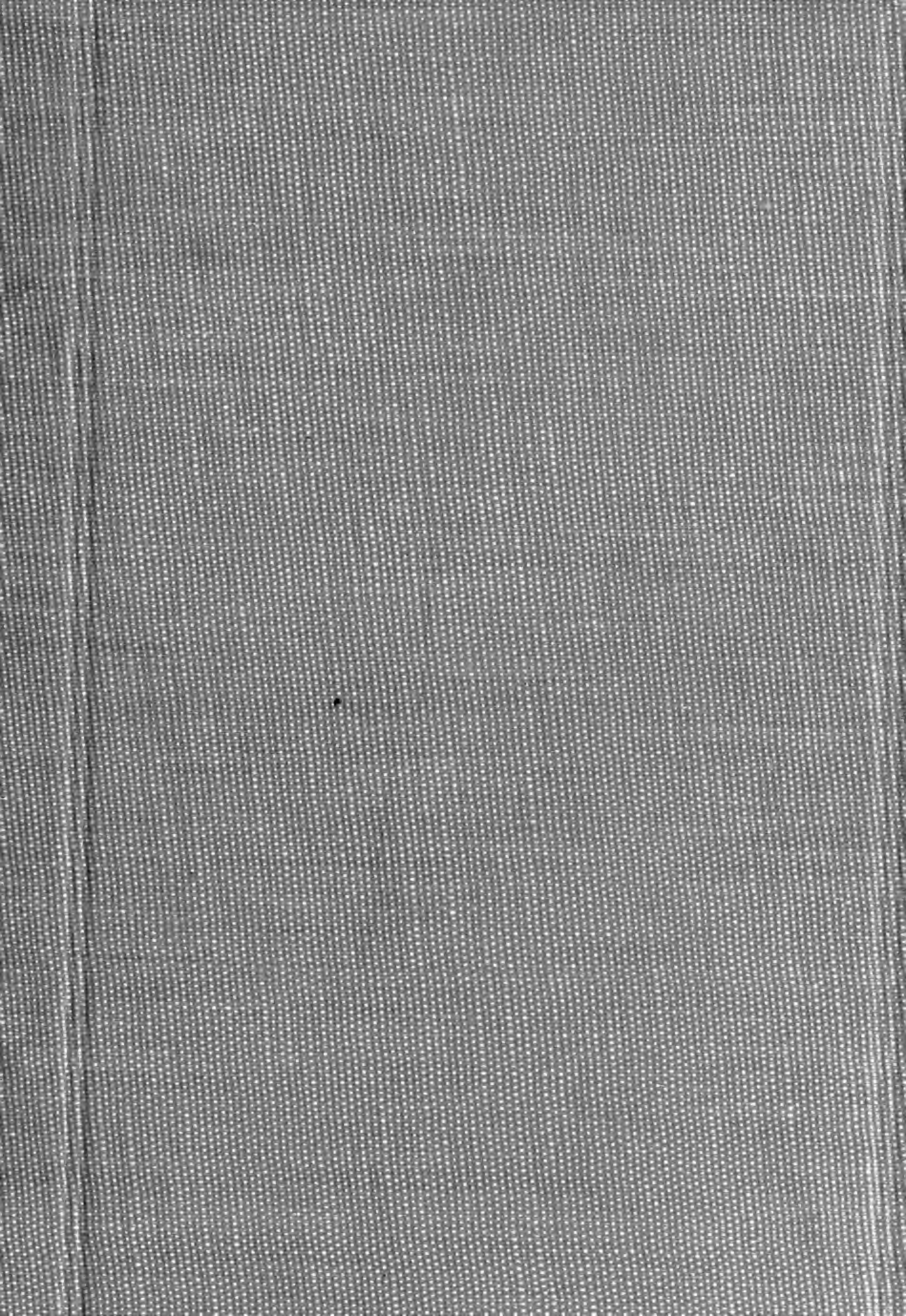

Form No. 7

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Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.

1174 No. 3183

United States
Circuit Court of Appeals
For the Ninth Circuit.

1174

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

BELLINGHAM NATIONAL BANK, THE CITY OF BELLINGHAM, MORSE HARDWARE COMPANY, WHIDBY ISLAND SAND & GRAVEL COMPANY, E. K. WOOD LUMBER COMPANY, MORRISON MILL COMPANY, K. SAUSET, CAINE GRIMSHAW COMPANY, JOHN BIEKERT, NORMAN TRANSFER COMPANY, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEIVER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams,

Appellees.

Transcript of Record

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

FILED
JUL 19 1918
F. D. MONCKTON,
CLERK.

The Argus Press, 71 Columbia St., Seattle

No.______

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

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BELLINGHAM NATIONAL BANK, THE CITY OF BELLINGHAM, MORSE HARDWARE COMPANY, WHIDBY ISLAND SAND & GRAVEL COMPANY, E. K. WOOD LUMBER COMPANY, MORRISON MILL COMPANY, K. SAUSET, CAINE GRIMSHAW COMPANY, JOHN BIEKERT, NORMAN TRANSFER COMPANY, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEIVER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams,

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The Argus Press, 71 Columbia St., Seattle

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United States District Court, Western District of Washington, Northern Division.

No. 9-E

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

NAMES AND ADDRESSES OF COUNSEL.

MESSRS. HASTINGS & STEDMAN,

Attorneys for Appellant, American Surety Company of New York, a corporation, Seattle, Washington.

MESSRS. KELLOGG & THOMPSON,

Attorneys for Appellant, American Surety Company of New York, a corporation, Seattle, Washington.

MESSRS. SATHER & LIVESEY,

Attorneys for Appellees, The Bellingham National Bank and Whidby Island Sand & Gravel Company, Bellingham, Washington.

D. W. FEATHERKILE, Esq.,

Attorney for Appellee, The City of Bellingham, Washington.

MESSRS. HADLEY & ABBOTT,

Attorneys for Appellees, E. K. Wood Lumber Co., Morrison Mill Co. and Morse Hardware Co., Bellingham, Washington.

MESSRS. KELLOGG & THOMPSON,

Attorneys for Appellees, Caine-Grimshaw Company, a corp., and K. Sauset, Bellingham, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Plaintiff,

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE

COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

Bill of Complaint.

To the Honorable Jeremiah Neterer, Judge of the above entitled court:

Comes now your petitioner, American Surety Company of New York, a corporation, and, for bill of complaint, states and alleges as follows, to-wit:

1.

That at all times herein mentioned said plaintiff, American Surety Company of New York, was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and was and is a resident and citizen of the State of New York, and is duly authorized to transact business in the State of Washington, and has paid its annual license fees last due to the State of Washington.

2.

That at all times herein mentioned, the above named defendants, Al Moran and W. T. Moran, were, and still are, co-partners doing business under the firm name and style of Moran Bros., and were both residents and citizens of the State of Washington and of the Western District thereof,

residing at the City of Bellingham, in Whatcom County, Washington.

3.

That at all times herein mentioned, the defendant, City of Bellingham, was, and still is, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington.

4.

That at all times herein mentioned, the defendant, Bellingham National Bank, was, and still is, a corporation organized and existing under the national banking act of the United States of America, and was a citizen and resident of the State of Washington, and of the Western District thereof, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

5.

That at all times herein mentioned, Morse Hardware Company, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Washington, and was, and still is, a resident and citizen of the State of Washington, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

6.

That at all times herein mentioned, defendant, Whidby Island Sand & Gravel Company, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Wash-

ington, and was, and still is, a resident and citizen of the State of Washington, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

7.

That at all times herein mentioned, defendant, E. K. Wood Lumber Company, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Washington, and was, and still is, a resident and citizen of the State of Washington, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

8.

That at all times herein mentioned, defendant, Morrison Mill Company, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Washington, and was, and still is, a resident and citizen of the State of Washington, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

9.

That at all times herein mentioned defendant, K. Sauset, was, and still is, a resident and citizen of the State of Washington, having his residence in the City of Bellingham, Whatcom County, Washington.

10.

That at all times herein mentioned defendant, Caine Grimshaw Company, was, and still is, a cor-

poration organized and existing under and by virtue of the laws of the State of Washington, and was, and still is, a resident and citizen of the State of Washington, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

11.

That for a first cause of action against defendants, and all of them, plaintiff alleges as follows, to-wit: That on or about the 29th day of July, 1916, said defendants, Al Moran and W. T. Moran, co-partners as Moran Bros., entered into a contract with the City of Bellingham for the improvement of Maryland Street from Ellis Street to James Street in the City of Bellingham at the agreed contract price of $5,087.80,—said improvement to consist of clearing and paving the asphalt pavement as more particularly appears by a contract entered into under Ordinance of the City of Bellingham No. 2773, creating Local Improvement District No. 519. (A copy of which contract is hereto attached, marked Exhibit A and made a part hereof.)

12.

That to secure the performance of said contract entered into under the terms and conditions thereof, and to secure the payment due to all laborers, mechanics, sub-contractors, materialmen and persons who should supply such person or persons, or sub-contractors with materials, supplies and provisions for carrying on such work, said Moran

Bros. and the plaintiff herein, American Surety Company of New York, executed a bond unto the State of Washington in the form provided by law in the penal sum of $5,087.80, which said bond was duly executed on the 27th day of July, 1916, and filed with the City of Bellingham, and that said contract and said bond were accepted by the City of Bellingham.

13.

That said contract has been fully completed and accepted by the City of Bellingham, but no payment has been made thereon either to said contractor or to the materialmen hereinafter named who have filed claims against said bond.

14.

That plaintiff is advised and so alleges the fact to be that the following claims have been presented against said bond, to-wit:

Morrison Mill Company for the sum of.... $65.56
Caine Grimshaw Company for the sum of $1,268.19
Morse Hardware Company for the sum of $133.25
K. Sauset for the sum of..............................$2,125.36

15.

That plaintiff is informed, and verily believes, that said Al Moran and W. T. Moran, co-partners as Moran Bros., have assigned to the Bellingham National Bank all sums coming to them under said contract for certain advances made by the said Bellingham National Bank to said Moran Bros. and plaintiff avers that said assignment was given

to said Bellingham National Bank as security for money to be advanced, the exact amount of said claim of said Bellingham National Bank, by reason of said assignment, plaintiff does not know, but is informed that said claim of the Bellingham National Bank against Moran Bros. amounts to $5,-419.17, but whether all of said claim is by reason of advances upon said Maryland Street contract, plaintiff does not know.

16.

Plaintiff further avers that it is liable to the payment of all of said claims excepting the claim of the Bellingham National Bank under its said bond.

17.

Plaintiff further avers that defendant, City of Bellingham, is about to pay over to said Moran Bros., or to their assignee, Bellingham National Bank, the full amount of the contract price of said bond, without requiring the application of any of said sums due said Moran Bros. to the payment of said claims filed against said Moran Bros. on said bond.

18.

Plaintiff further avers that said Al Moran and W. T. Moran, co-partners as Moran Bros., are insolvent, and are unable to respond to any claim of the plaintiff that it may have by reason of the payment of said claims so filed against said bond, and that if said sums due to said Moran Bros. are paid to said Moran Bros., or said Bellingham Na-

tional Bank, their assignee, this plaintiff will have no protection on its liability on said claims to pay said claims or source from which it can seek reimbursement for payment thereof.

19.

Plaintiff further avers that in law and equity the sums unpaid to Moran Bros. on said contract ought of right to be applied in payment of materialmen, laborers and sub-contractors employed in prosecuting said work, and those furnishing materials and supplies to such persons, to the end that all claims should be paid that are justly chargeable to said work out of the contract price agreed to be paid therefor, to the extent that such sums so unpaid by the City of Bellingham on said contract, undistributed, are adequate therefor.

20.

Plaintiff further avers that in law and in equity it has a lien by virtue of becoming the surety of the said Moran Bros. on their said contract with the City of Bellingham, upon all sums due them under said contract, to reimburse it for all sums it may be forced to pay on account of said claims so filed.

21.

Plaintiff further avers that it is not advised as to the validity of the claims of the other defendants than Moran Bros. as filed and asserted against said Moran Bros. and said bond, and that said defendants should be brought into this court to present their claims and offer proof in support thereof,

and said City of Bellingham should be restrained from paying said money due on said contract, or any portion thereof, to said Moran Bros. or to said Bellingham National Bank, but should be permitted to pay said money into the registry of this court to be distributed in the payment, so far as the same is adequate therefor, of the laborers, materialmen, contractors, and sub-contractors who have performed labor or furnished materials upon said contract.

22.

Plaintiff further avers that this is a controversy between citizens and residents of different states, to-wit: between the American Surety Company of New York, a citizen and resident of the State of New York, and said defendants, all of whom are citizens and residents of the State of Washington, and that this action involves more than $3,000, exclusive of interest and costs.

FOR A SECOND CAUSE OF ACTION, This plaintiff avers:

1.

That on or about the 22nd day of September, 1916, the City of Bellingham entered into a contract with defendants, Al Moran and W. T. Moran, co-partners as Moran Bros., for the improvement of Iowa Street from James Street to Woburn Street, in the City of Bellingham, by clearing and grubbing, laying concrete walks and sewers, for the agreed compensation of $3,135, and that plaintiff, American Security Company of New York,—in

order to secure the performance of said contract, and the payment of all laborers, mechanics, subcontractors and materialmen, and all persons who shall supply such person or persons or sub-contractors with materials, supplies and provisions for the carrying on of such work,—as surety for said Al Moran and W. T. Moran, executed a bond running to the State of Washington, on or about September 20, 1916, in the penal sum of $3,135, and said bond and contract were accepted by the City of Bellingham, and said bond is kept and held by the City of Bellingham as security for the performance of said contract, and is in full force, effect and virtue, and this plaintiff recognizes and always has recognized its liability thereunder, according to its true intent, tenor and meaning. (A copy of which said contract is hereto attached, marked Exhibit B and made a part hereof.)

2.

That said defendants, Moran Bros., have substantially completed said contract for the improvement of Iowa Street, and same has been accepted by the City of Bellingham, but that no payments have been made to said Moran Bros. or to those furnishing material and labor on said contract, and the full amount of the contract price, to-wit: $3,-135, remains in the hands of the City of Bellingham to be applied toward the payment of work done under said contract.

3.

That plaintiff is informed and verily be-

lieves that said defendants, Moran Bros., purported to sell, assign, transfer and set over unto the defendant, Bellingham National Bank, the warrants, vouchers or bonds to be issued in payment of the contract of said defendants, Moran Bros., to the City of Bellingham for advances theretofore or thereafter to be made by said Bellingham National Bank, and said assignment was given as security for money so advanced or to be advanced.

4.

Plaintiff further avers that the aggregate amount of all of the claims against said Moran Bros. for said work, exceeds the amount of said contract price, and that the following claims are asserted against said contract price, to-wit:

Bellingham National Bank $5,419.17
(though what portion thereof is against money advanced for the Iowa Street contract, plaintiff does not know).
Morse Hardware Company $1,023.43
Whidby Island Sand & Gravel Co............ $630.00
E. K. Wood Lumber Company................ $174.46
Morrison Mill Company $75.16
K. Souset $2,000.00

and there is due and unpaid a pay-roll of $191.90 to laborers.

5.

Plaintiff further avers that it is liable to the payment of all of these claims that have been filed with the City of Bellingham against said bond within thirty days after the acceptance thereof,

and that said claims exceed the amount due upon said contract.

6.

Plaintiff further avers that it is informed and verily believes that said defendants, Moran Bros., have no means or property out of which judgment could be satisfied or out of which they can or could indemnify this plaintiff for any sum it may be called upon to advance in the payment of said claims, and that if the sums due under said contract are paid to said Moran Bros., or to said Bellingham National Bank, this plaintiff will have no protection for its liability on said bond to pay said claims or source from which it can seek reimbursement for payment thereof.

7.

Plaintiff further avers that in law and in equity the sums unpaid to defendants, Moran Bros., on said contract, ought of right to be applied to the payment of materialmen, laborers and sub-contractors employed in prosecuting said work to the end that all claims should be paid that are justly chargeable to said work out of the contract price agreed to be paid therefor, to the extent that such sums undistributed of said contract price are adequate therefor, and plaintiff avers that its lien in and to the sums due and payable on said contract still unpaid is superior to any lien of the Bellingham National Bank in or to the same for moneys advanced by it, and that in law and equity said Bellingham National Bank is not entitled to re-

ceive from the City of Bellingham the moneys due to said Moran Bros. on said contract under any assignment made by said Moran Bros. to it, but that said balance due upon said contract should be paid into court to be distributed by this Honorable Court as in law and equity it may be determined to be meet and proper.

8.

Plaintiff further avers that this controversy in this second cause of action is between citizens and residents of different states, to-wit: between the American Surety Company of New York, a citizen and resident of the State of New York, and all of said defendants, who are citizens and residents of the State of Washington, and involves more than $3,000, exclusive of interest and costs.

9.

Plaintiff incorporates in its second cause of action herein each and every allegation set forth and contained in its first cause of action touching the residence and citizenship and corporate capacity of the plaintiff and defendants herein, and makes the same a part of this its second cause of action.

WHEREFORE, plaintiff prays that pending this action, this Honorable Court may be pleased to restrain the defendants, Bellingham National Bank, Al Moran and W. T. Moran, co-partners as Moran Bros., and the City of Bellingham, from disbursing said sums so held by the City of Bellingham otherwise than in the payment of the claims

filed, provable and established against said bond, and that said defendants, and each of them, be required to appear at the time and place designated by this court, then and there to show cause, if any they have, why such injunction should not issue pendente lite, and that upon the final hearing hereof, this Honorable Court may be pleased to grant such an injunction enjoining and restraining said defendants from disbursing said moneys receivable under said assignment in payment of the claim of the Bellingham National Bank or to Moran Bros., until all of the claims justly provable against said contract and the bond furnished by this plaintiff have been duly paid and discharged, and that all of said defendants be required to file and prove their claims in this court, and to set forth whether they have filed their claims against said bond within the time required by law, and that they justly prove the validity of the claims so filed, and that said City of Bellingham be ordered and decreed to pay all sums due to said Moran Bros. into the registry of the court to be distributed by this Honorable Court to those who are entitled to receive payment on said contracts, and that plaintiff shall have such other and further relief as to this Honorable Court may seem meet and equitable in the premises.

KELLOGG & THOMPSON,
HASTINGS & STEDMAN,
Attorneys and Solicitors for the Plaintiff, American Surety Co. of New York.

State of Washington, County of King, ss:

S. H. Melrose, being first duly sworn, on his oath deposes and says: That he is the resident assistant secretary of the American Surety Company of New York, plaintiff above named; that he makes this verification for and on behalf of said plaintiff; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

S. H. MELROSE,

Subscribed and sworn to before me this May 19th, A. D. 1917.

(Seal) ROSE E. MOHR,

Notary Public in and for the State of Washington, residing at Seattle.

(Indorsed: Bill of Complaint. Filed in U. S. District Court, Western District of Washington, Northern Division, May 21, 1917. Frank L. Crosby, Clerk, by Ed. M. Lakin, Deputy.)

EXHIBIT A.

(Exhibit B Same in Form.)

CITY OF BELLINGHAM—DEPARTMENT OF PUBLIC WORKS.

PROPOSAL AND CONTRACT

For the Improvement of Maryland St., from Ellis St. to James St., under Ordinance No. 2773, creating Local Improvement District No. 519.

NOTICE.

Bidders are hereby notified that no bids can be withdrawn, for any cause whatsoever, after 10:30

o'clock A. M. of date of opening of bids by the Board of Public Works. A certified check for not less than five (5) per cent of the total amount bid and payable to the order of the City Comptroller, must be filed with the City Comptroller. Any bidder who fails to enter into a contract within ten (10) days after it is awarded to him, will be declared irresponsible, and his check will be forfeited as provided by the City Charter.

Do not bid before you fully understand the manner of payment proposed for the improvement.

PROPOSAL.

Bellingham, Washington, July 24, 1916.

To the City Council of the City of Bellingham:

The undersigned hereby certifies that we personally examined the plans, specifications and contract for the work to be done on Maryland St., and hereby agree to furnish all necessary material and labor required to complete said work in accordance with said plans and specifications and upon the terms and conditions provided in said specifications and form of contract, at the following prices, to-wit:

Bid	Written Price		
Clearing and Grub	Twenty Dollars	$20.00	lump sum
Earth	Forty cts.	.40	per cu. yd.
Lumber	Twenty Dollars	20.00	per M b m
Old Lumber	Five Dollars	5.00	per M b m
Concrete stops	Thirty cts.	.30	per lin. ft.
Con. box drain	Seventy cts.	.70	per lin. ft.
Monument covers	One Dollar	1.00	per cover

Con. paving, 1 course		per sq. yd.
Con. paving, 2 course		per sq. yd.
Asphalt paving	One and 35-100	1.35 per sq. yd.
Asphalt Maintenance		.01 per sq. yd.

$5087.80

Date of completion: Nov. 1st, 1916,
Amt. $5087.80.

MORAN BROS.,
By Al Moran, Bidder.

PLANS AND SUPERINTENDENCE.

Whenever in these specifications the words Engineer or City Engineer occur, they shall be understood to refer to the City Engineer himself or his duly appointed deputy or assistant acting within the authority conferred on him by the City Engineer. Wherever the word City occurs it shall be understood to mean the City of Bellingham. But no agent of the City shall have power to make, alter, enlarge, or relax the stipulations or requirements of these specifications, without the formal authorization so to do, conferred by ordinance, resolution or other usual special action of the City except in so far as such authority may be specifically conferred, in or by the specifications themselves.

General and detail plans where necessary will be furnished for this improvement by the City Engineer showing the character and dimensions of the

structures to be built and such plans are hereby made a part of these specifications and will be enforced. During the progress of the work the City Engineer may furnish additional plans and make such alterations of the original plans as he deems necessary and the contractor shall upon receiving such additional plans or alterations cause the work to be executed in conformity with such additional plans and alterations to the satisfaction of the City Engineer.

Inspection:—The Engineer may provide for the inspection, by assistants and inspectors, of all materials used and all work done under this contract. Such inspection may extend to all parts of the work and the Engineer and his inspectors shall have free access to all places where any material used for this improvement is prepared. The contractor shall at his own expense furnish such labor as is necessary for the handling of material for proper inspection and such samples as the City Engineer may require. Inspectors shall have authority to reject defective material and to suspend any work that is being improperly done, subject to the final decision of the Engineer. Inspectors shall have no authority to permit deviations from, or to relax any of the provisions of these specifications without the permission or instruction of the Engineer; nor to delay the contractor by failure to inspect materials and work with reasonable promptness.

GENERAL STIPULATIONS.

The contractor is required to furnish all necessary labor and materials and fully to complete the said work in accordance with the plans and specifications, and to the satisfaction of the City Engineer, for the price bid. Bidders must examine and judge for themselves as to the location of the proposed work, the nature of the excavation to be made, and the work to be done. It is understood that the whole of the work to be performed under the contract for this improvement is to be done at the contractor's risk, and he is to assume the responsibility and risk of all damages to the work or to property on the line of said work which may be occasioned by floods, backwater, caving of the street, settling of the foundations of buildings, or from any cause whatever. The contractor shall not assign or transfer the contract for this improvement or sub-let any of the work embraced in it without the written consent of the Board of Public Works.

Order of Work:—The contractor shall commence the work at such points as the City Engineer may direct, and shall conform to his directions as to the order of time in which the different parts of the work shall be done.

Instructions:—Whenever the contractor is not present on the work, orders will be given to the superintendent or overseer who may have immediate charge thereof, and shall by them be received and strictly obeyed. And if any person employed

on the work shall refuse or neglect to obey the directions of the City Engineer or Board of Public Works in anything relating to the work, or shall appear to be incompetent, intemperate, disorderly or unfaithful, he shall, upon the requisition of the Engineer, be at once discharged, and not again employed without his consent.

Signals and Lights:—The contractor will be required to observe all City Ordinances in relation to obstructing streets, keeping open passage ways and protecting the same where exposed, maintaining signals and lights, and generally to obey all laws and ordinances controlling or limiting those engaged on the works, and the said contractor expressly stipulates and agrees to erect and maintain good and sufficient guards, barricades, signals and lights at all unsafe places at or near where the said work and improvement contemplated herein is to be done or made, and to indemnify and save harmless the City of Bellingham from all suits and actions, of every name and description, brought against the said City for or on account of any injuries or damages received or sustained by any party or parties, by reason of the failure of said contractor to erect or maintain such guards, barricades or signals, or by or in consequence of any negligence of said contractor or his or their agents or employees, in carrying on said work, or by or on account of any act or omission of said contractor in the performance of said work; and it is agreed by the contractor that so much of the money as

shall be due to him or them under and by virtue of the contract for this improvement as shall be considered necessary by the Board of Public Works, may be retained by the City of Bellingham until all suits or claims for damages as aforesaid shall have been settled, and evidence to that effect furnished to the satisfaction of said Board.

Sanitary Conveniences:—The contractor shall provide all necessary privy accommodations for the use of his employees on the street, and shall maintain the same in a clean and sanitary condition. He shall not create nor permit any nuisance to the public or to residents in the vicinity of the work.

Public Convenience:—No material, or other obstruction shall be placed within five feet of fire hydrants, which must be at all times readily accessible to the Fire Department.

During the progress of the work the convenience of the public and of the residents along the street must be provided for as far as practicable. Convenient access to driveways, houses and buildings along the street must be maintained wherever possible. Temporary approaches to and crossings of intersecting streets and sidewalks must be provided and kept in good condition wherever practicable.

Storage of New Material:—The material for construction when brought upon the street shall be neatly piled so as to cause as little obstruction to travel as possible, and so that it may be conveniently inspected.

Quality of Material and Work:—The judgment and decision of the Engineer as to whether the materials supplied and the work done under this contract comply with the requirements of these specifications shall be conclusive and final. No material shall be used in the work until it has been examined and approved by the Engineer or his authorized agents. All rejected material must be promptly removed from the work and replaced with material acceptable to the Engineer and all improper or defective work must be corrected, and, if necessary, removed and reconstructed so as to comply with these specifications and the instructions of the City Engineer.

Measurements and Estimates:—Final estimates shall be based upon the actual quantities of completed and accepted work, customary or convenient methods of measurements and computation to the contrary notwithstanding.

Disputes:—To prevent all disputes and litigation, it is further agreed by the contractor that the City Engineer shall in all cases determine the amount of work to be paid for under the contract for this improvement, and his estimates and decisions shall be final and conclusive, subject to the approval of the Board of Public Works.

Change of Plan:—The City Engineer shall have the right to make changes in the location, form, dimensions, grades and alignments, and to make any variations in the quantity of the work to be done, as exhibited in the schedule of prices or bid for said work, and to entirely exclude any

of the items of work relating to said quantities at any time, either before the commencement of work, or during the progress, without thereby altering or invalidating any of the prices therein named. Should such action diminish the amount of work that would otherwise be done, no claim for damages shall be made on the ground of loss of anticipated profits on work so dispensed with; and should such action be taken after the commencement of any particular piece of work, and result thereby in extra cost to the contractor, the City Engineer shall estimate the amount to be allowed therefor, which he shall consider fair and equitable, and his decision shall be final and conclusive.

Tearing Up Street:—The contractor shall not be allowed to dig up or occupy with material any more of the street than there is absolute necessity for in the prosecution of the work, and of such necessity the City Engineer shall be the sole judge. The contractor shall give forty-eight hours' notice, when he will require the services of the Engineer for laying out any portion of the work. He shall furnish and keep on the work at all times a spirit-level and straightedge, of such form and size as directed by the Engineer. He shall furnish all lumber for stakes, under the direction of the Engineer, and shall carefully preserve all stakes when set; and in case any of them have to be replaced by the Engineer, the contractor shall be charged with the expense thereof, and the same be deducted from his estimates.

Monuments and Stakes:—The contractor shall not disturb any monuments or stakes found on the line of improvement until ordered by the Engineer. A penalty of twenty-five dollars will be imposed for each monument disturbed without orders. and the amount deducted from the estimates.

Water and Sewer Pipes, Conduits:—The contractor shall support, by timbers or otherwise, all water, sewer and gas pipes and conduits which may be affected in any way by the work, and do everything necessary to support and sustain said water, sewer and gas pipes and conduits laid along or across said street. In case any of said water, sewer and gas pipes, and conduits shall be damaged, they shall be repaired by the authorities having control of the same, and the expense of such repairs shall be deducted from the amount due the contractor on his final estimate.

Time of Completion:—The work embraced in the contract for this improvement shall be begun immediately after the contract is duly executed and the bond filed as herein provided, and carried on regularly and uninterruptedly thereafter (unless the said Board shall otherwise, in writing, specially direct), with such force as to secure its completion prior to Nov. 1st, 1916 days after said contract has been executed, the time of beginning, rate of progress and time of completion being essential conditions of said contract. And if the contractor shall fail to complete the work by the time above specified, the sum of $7.50 per day, for each and

every day thereafter until such completion, shall be deducted as liquidated damages from the moneys payable under said contract, together with such amounts of money as shall have been proven to be the damages resulting to abutting property owners, arising from the contractor's failure so to complete such work.

It is further specifically agreed that if at any time the City Engineer is of the opinion that the work is unnecessarily delayed, and will not be finished within the prescribed time, he shall notify the contractor in writing to that effect, and if the said contractor shall not, within five days thereafter, take such measures as will, in the judgment of said Engineer, insure the satisfactory completion of the work, the Board of Public Works may then notify the said contractor to discontinue all work under the contract for this improvement; and it is hereby agreed that the said contractor shall immediately respect such notice and stop work and cease to have any rights to the possession of the grounds. The Board of Public Works may thereupon employ such force as they may deem advisable to complete the work, and charge the expense of all labor and materials necessary for such completion to said contractor; and the expense so charged shall be deducted and paid by the City of Bellingham out of such moneys as may be then due, or may afterwards become due, to said contractor under and by virtue of the contract for this improvement, and in case such expense is less than the sum which

would have been payable under such contract if the same had been fulfilled by the said contractor, then said contractor shall be entitled to receive the difference; and in case such expense is greater, the said contractor shall pay to the City the amount of such excess so due. And if the said contractor shall assign the contract for this improvement or abandon the work thereon, or shall neglect or refuse to comply with the instructions of the City Engineer relative thereto, or shall in any manner fail to comply with any of the specifications or stipulations herein contained, or with the requirements of the Charter or Ordinances of the City of Bellingham, the Board of Public Works shall have the right to annul and cancel said contract, and to relet the work, or any part thereof, and such annulment shall not entitle the said contractor to any claim for damage on account thereof, nor shall it affect the right of the City to recover damages which may arise from such failure.

In case any extra work is required for which a price has not been included in the contract for this improvement, the same shall not be begun until a price therefor shall have been agreed upon by the contractor and the City Engineer. If, for any reason, the said extra work cannot be performed at an agreed price, it shall be paid for at the actual cost of labor and material required, together with ten per cent. additional.

The said contractor agrees to pay the wages of all persons and for assistance of every kind em-

ployed upon or about said work, and for all materials purchased therefor, and the City of Bellingham may withhold any and all payments under this contract until satisfied that such wages, assistance and materials have been fully paid for.

The contract for this improvement shall take effect imediately after it has been duly executed and the bond filed, and shall be assigned only with the written consent of the Board of Public Works endorsed thereon, and no assignment that shall be made shall release the contractor therefrom, or his or their sureties, from any liabilites arising under this contract.

And it is further agreed that said work shall be performed in workdays of not more than eight hours each, except in cases of extraordinary emergency; and that this contract may be cancelled by the Board of Public Works in case such work is not performed in accordance with the terms of this provision and no case of extraordinary emergency shall be construed to exist in any case where other labor can be found to take the place of labor which has already been employed for eight hours in any calendar day.

All water used by the contractor during the progress of the work on this improvement for any purpose whatever shall be charged against said contractor in conformity with the rules and regulations of the City Water Department and must be paid by him. The cost of such water shall be included in the various prices bid for the various

items of this improvement. Before the final estimate of this contract is accepted the contractor shall furnish the Engineer a receipt signed by the City Water Superintendent in full for the payment for all city water used on this improvement.

Blasting:—All blasting shall be carried on in accordance with the Ordinances of the City of Bellingham relative thereto, which ordinances are made a part hereof. Care shall be used to protect all persons and property in the vicinity. Where persons or property are liable to injury from flying rocks or pieces of stump the substance blasted shall be covered with timbers or brush securely chained together. The City Engineer shall be sole judge of the manner of blasting and the protection used for persons and property in the vicinity.

Patents:—All fees for any patent invention, article agreement, or other apparatus that may be used upon or in any way connected with the construction, erection, or maintenance of the work, or any part thereof, embraced in the contract or these specifications, shall be included in the price stipulated in the contract for said work, and the contractor or contractors must protect and hold harmless the City against any and all demands for such fees or claims.

Eight Hour Day:—It is hereby further agreed that this contract is made and is to be carried out subject to and in pursuance of Sec. 6572 to 6577, both inclusive of Remington & Ballinger's Annotated Code of the State of Washington, requiring said work to be done in work days of not more

than eight hours each, excepting in cases of extraordinary emergency and that this contract may be cancelled by the Board of Public Works in case such work is not performed in accordance with the terms of this provision and no case of extraordinary emergency shall be construed to exist in any case where other labor can be found to take the place of labor which has already been employed for eight hours in any calendar day. Provided, that when the hours of labor are extended in case of extraordinary emergency, the rate of pay for time employed in excess of eight hours of each calendar day, shall be one and one-half (1½) times the rate of pay allowed for the same amount of time during eight hours' service.

Minimum Wage:—It is further understood and agreed that this contract was made and is to be carried out subject to and in pursuance of Sec. No. 188½ of the City Charter of the City of Bellingham, and Ordinance No. 1785 of the City of Bellingham, and said contractor agrees to pay the persons and all of the persons employed by him on this work a rate of wages which is not less than the minimum rate as specified in said Ord. 1785 for this class of work, and that in case he should pay any person employed by him upon this work either directly or indirectly a rate of wages less than the minimum fixed by Ord. 1785, such failure or violation of this section shall immediately work a forfeiture of this contract and all rights which said contractor shall have hereunder.

CONTRACT FOR LOCAL IMPROVEMENT.

This Contract, made in duplicate this 29th day of July, A. D. 1916, by and between the City of Bellingham, a Municipal Corporation of the State of Washington, party of the first part and............

Witnesseth, That the said party of the second part agree....to improve Maryland St., Ellis St. to James, in the said City of Bellingham, as ordered by Ordinance No. 2773 approved June 30, 1916, in all respects in accordance with the plans, specifications and general stipulations prepared by the City Engineer and now on file in the office of the City Comptroller of said City, a copy of which plans, specifications and general stipulations are hereto attached and expressly made a part of this contract. Said part.... of the second part agree.... to provide all necessary machinery, tools, apparatus and other means of construction and do all work and furnish all the material called for by said plans, specifications and stipulations in the manner therein prescribed and according to the requirements of said City Engineer, and subject to the superintendence of the Board of Public Works and acceptance by the party of the first part, for the following sums, to-wit: as per list on front page.

Clearing and Grubbing....dollars ($............)
Earth including sub-grading ....dollars
($............) per cubic yard.
Rock including sub-grading..............................dollars
($............) per cubic yard.

Wood Walks, Curbs, Gutters, etc....................dollars ($............) per M., B. M.

Concrete Walks ....cents ($0.........) per sq. ft.

Concrete Alley Crossing.............. cents ($0............) per square ft.

Tile Drain............cents ($0............)per linear foot

Planking and Bridging................dollars ($............) per M., B. M.

Piling ....

Posts ....

Concrete Curbs and Gutters ....

Concrete Curbs and Gutters—armored.....................

Sewers............................ inch ....

Sewers............................ inch ....

Sewers............................ inch ....

Concrete Culvert ....inch................................

Iron—re-inforcing ....

Brick Paving ....

Asphalt Paving ....

Concrete Paving—one course ....

Concrete Paving—two course ....

Warrenite Paving ....

As soon as possible after the acceptance of the work herein agreed to be done and upon the recommendation and certificate of the Engineer, payment at the rates above specified shall be made, provided, that nothing contained herein shall be construed to affect the right hereby reserved by the Board of Public Works to reject the whole or any portion of the aforesaid work, should the certificate be found to be inconsistent with the terms of this agreement or otherwise improperly given.

All of said payments shall be made by Local Improvement warrants and bonds issued in accordance with the Charter and Ordinances of the City of Bellingham, and the Laws of the State of Washington upon Local Improvement Fund District No. 519, and the said part.... of the second part agree.... to look solely to said Local Improvement Fund, District No. 519 for the payment for said work, and in no event shall the City of Bellingham, in its corporate capacity, become liable under this contract for the payment of any sum whatsoever. Provided, said City shall re-imburse itself in full for its costs as specified in Sec. 55, Chap. 98, Laws of Washington 1911, out of first moneys paid into said fund.

It is hereby expressly provided that no claim shall be made by the contractor upon the said Local Improvement District, for any portion of the contract price herein provided to be paid by the issuance of local improvement bonds or warrants on said District, to the contractor until in pursuance of the Law, Charter and Ordinance under which this improvement is made, such bonds or warrants can be legally issued.

This contract is made and entered into with reference to the Charter and Ordinances of the City of Bellingham as the same are now in force, and the Laws of the State of Washington, and the provisions of said Ordinance, Charter and Laws, relating to the subject matter of this contract, are hereby made a part hereof, with the same effect as

if said provisions were herein incorporated and expressly set forth.

In Witness Whereof, Said party of the first part has caused these presents to be signed by its Mayor and attested by its City Comptroller, and said parties of the second part have hereunto set their hands the day and year first above written.

THE CITY OF BELLINGHAM,
By A. M. Muir, Mayor.
MORAN BROS.,
A. L. Moran (Seal)

Attest: Chas. A. McLennan, City Comptroller.

(Indorsed: Excerpt from Exhibit "A" including pages 1 and 15 to 19, inclusive.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Plaintiff,

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation,

Defendants.

Order.

It appearing that this is an action brought to enforce an equitable lien by plaintiff herein upon moneys in the hands of the City of Bellingham, earned by defendants, Al Moran and W. T. Moran, co-partners as Moran Bros., on the Maryland Street improvement under Ordinance of the City of Bellingham No. 2773, and on the Iowa Street

improvement under Ordinance of the City of Bellingham, No. 2796;

And it appearing to the Court by the return of the United States Marshal that the defendants, Al Moran and W. T. Moran, cannot be found within this jurisdiction, and that they have absented themselves from their usual place of abode within this jurisdiction;

It is here and now ORDERED and ADJUDGED that said defendants, Al Moran and W. T. Moran, co-partners as Moran Bros., do appear, plead, answer or demur on or before the 3rd day of July, 1917, at the United States Court House in the City of Bellingham, County of Whatcom, at 2 p. m. and that this order shall be published once a week for six consecutive weeks in the Bellingham Herald, a newspaper of general circulation in this district and in the City of Bellingham, County of Whatcom.

Done in open court this 28th day of May, A. D., 1917.

JEREMIAH NETERER, Judge.

(Indorsed: Order. Filed in the U. S. District Court, Western District of Washington, Northern Division, May 28, 1917. Frank L. Crosby, Clerk ,by Ed. M. Lakin, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers, *et al.,*
Defendants.

Affidavit of Service.

United States of America, District and State of Washington, County of King:—ss.

L. B. Stedman, being first duly sworn, on his oath deposes and says:

That he is one of the proctors for the plaintiff herein.

That an order to appear, plead, answer or de-
day of July, 1917, at the hour of 2 o'clock P. M.,
mur to the complaint herein on or before the 3rd
was duly made by this Honorable Court on the 28th day of May, 1917, and was duly published in the Bellingham Herald, a newspaper of general circulation published and issued at Bellingham, in Whatcom County, State of Washington, for seven consecutive weeks, beginning with the 29th day of May, 1917, as more particularly appears by the affidavit of E. G. Earle hereto attached and made a part of this affidavit of service, and that neither of said defendants, Al Moran or W. T. Moran, has

entered any appearance in this action or filed any plea, answer or demurrer.

L. B. STEDMAN.

Subscribed and sworn to before me this July 16th, 1917.

(Seal) ROSE E. MOHR,

Notary Public in and for the State of Washington, residing at Seattle.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 128-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff*,

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation,

Defendants.

Order.

It appearing that this is an action brought to enforce an equitable lien by plaintiff herein upon moneys in the hands of the City of Bellingham, earned by defendants, Al Moran and W. T. Moran, co-partners as Moran Bros., on the Maryland street improvement under Ordinance of the City of Bellingham No. 2773, and on the Iowa street improvement under Ordinance of the City of Bellingham, No. 2796;

And it appearing to the Court by the return of the United States Marshal that the defendants, Al Moran and W. T. Moran, cannot be found within this jurisdiction, and that they have absented themselves from the usual place of abode within this jurisdiction;

It is here and now ordered and adjudged that said defendants, Al Moran and W. T. Moran, co-partners as Moran Bros., do appear, plead, answer or demur on or before the 3rd day of July, 1917, at the United States Court House in the City of Bellingham, County of Whatcom, at 2 p. m., and that this order shall be published once a week for six consecutive weeks in Bellingham Herald, a newspaper of general circulation in this district and in the City of Bellingham, County of Whatcom.

Done in open Court this 28th day of May, A. D. 1917.

JEREMIAH NETERER, Judge.

The foregoing is a full, true and correct copy of the original order made on the 28th day of May, 1917.

Witness my hand and official seal this 28th day of May, 1917.

FRANK L. CROSBY, Clerk,
By ED M. LAKIN, Deputy.

Affidavit of Publication.

State of Washington, County of King:—ss.

E. G. Earle, being first duly sworn, says that he is the Business Manager of the Bellingham Herald, which is a daily newspaper published and issued daily regularly at Bellingham in Whatcom County, State of Washington, and is of general circulation in said County and State; that the No. 128-E, American Surety Company vs. Moran, of which the one hereto attached is a true and correct copy, was published in said newspaper once a week for seven weeks, being published seven consecutive times, first publication being on the 29th day of May, 1917, and the last on the 3rd day of July, 1917. That said notice was published in the regular and entire issue of every number of said newspaper during said period and times of publication; that said notice was published in the newspaper proper and not in a supplement; that the charges herein made are at the regular rates charged for such advertising, and that the same or any part thereof has not been paid.

E. G. EARLE.

Subscribed and sworn to before me this 5th day of July, 1917.

(Seal) C. M. NAFF,
Notary Public in and for the State of Washington, residing at Bellingham.

(Indorsed: Affidavit of Service. Filed in the U. S. District Court, Western District of Washington, Northern Division, July 16, 1917. Frank L. Crosby, Clerk, by Ed. M. Lakin, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Bros., *et al.,*

Defendants.

Order of Default Against Al Moran and W. T. Moran, Co-partners as Moran Bros.

This cause coming on for hearing upon the application of plaintiff herein for an order of default against Al Moran and W. T. Moran, co-partners doing business as Moran Brothers, and the Court being duly advised in the premises, as more particularly appears by the affidavit of L. B. Stedman and E. G. Earle filed herein, to-wit: that the order to appear, plead, answer or demur made by this Court on the 28th day of May, 1917, was duly published as therein directed in the Bellingham Herald for once a week for seven consecutive weeks, beginning with the 29th day of May, 1917; and it further appearing that neither of said de-

fendants has appeared herein or filed any plea, answer or demurrer to the complaint; and it further appearing by the return of the United States Marshal herein, that the said Al Moran and W. T. Moran could not be found in the State of Washington, and were absent therefrom;

NOW, THEREFORE, it is hereby ORDERED and ADJUDGED that the default of said Al Moran and W. T. Moran, co-partners as Moran Brothers, and each of them, be, and it hereby is entered;

It is hereby further ORDERED and ADJUDGED that said Al Moran and W. T. Moran are hereby declared and adjudged to have no right, title or interest in or to any moneys in the possession of the City of Bellingham on account of the Maryland Street improvement, under ordinance of the City of Bellingham No. 2773, or on the Iowa Street improvement under Ordinance of the City of Bellingham No. 2796, superior to the right, title and interest of the plaintiff in said moneys.

Done in open court this 16th day of July, A. D., 1917.

(Signed) JEREMIAH NETERER, Judge.

(Indorsed: Order of Default Against Al Moran and W. T. Moran, co-partners as Moran Bros. Filed in the U. S. District Court, Western District of Washington, Northern Division, July 16th, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Bros.; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

Answer of Defendant, The Bellingham National Bank.

The Answer of the Bellingham National Bank, a corporation organized under the laws of the United States of America, one of the above named defendants, to the Bill of Complaint of the above named plaintiff, admits, denies and alleges as follows:

I.

Answering the allegations of Paragraph I

thereof, said defendant states that it is without knowledge concerning the allegations therein contained.

II.

Answering paragraph II thereof said defendant admtis the allegations therein contained.

III.

Answering paragraph III thereof said defendant admits the allegations therein contained.

IV.

Answering paragraph IV thereof said defendant admits the allegations therein contained.

V.

Answering paragraph V thereof said defendant admits the allegations therein contained.

VI.

Answering paragraph VI thereof said defendant admits the allegations therein contained.

VII.

Answering paragraph VII thereof said defendant admits the allegations therein contained.

VIII.

Answering paragraph VIII thereof said defendant admits the allegations therein contained.

IX.

Answering paragraph IX thereof said defendant admits the allegations therein contained.

X.

Answering paragraph X thereof said defendant admits the allegations therein contained.

XI.

Answering paragraph XI thereof said defendant admits the allegations therein contained.

XII.

Answering paragraph XII thereof said defendant admits the allegations therein contained.

XIII.

Answering paragraph XIII thereof said defendant admits the allegations therein contained.

XIV.

Answering paragraph XIV thereof said defendant admits the allegations therein contained.

XV.

Answering paragraph XV thereof said defendant admits that Al Moran and W. T. Moran, co-partners as Moran Brothers, have assigned to said Bellingham National Bank, all sums coming to them under said contract for advances made by said Bellingham National Bank to said Moran Brothers; and admits that said assignment was given as security for money advanced by said bank to said Moran Brothers, and in this behalf alleges that the amount due to said Bellingham National Bank by virtue of said assignments and said advances on both the Maryland Street contract and the Iowa Street contract, amounts to $4814.22, of which $3,033.15 is due for advancements made on the Maryland Street contract, and of which $3,-033.15, $600.00 draws interest at 8% per annum from September 11, 1916; $1,862.60 draws inter-

est from March 2, 1917, at 8% per annum; $570.55 draws interest from April 12, 1917.

That said claim by reason of said advancements amounts to $3033.15 upon said Maryland street contract, and $1,781.07 upon the Iowa Street contract in plaintiff's Bill of Complaint referred to.

XVI.

Answering paragraph XVI said defendant admits that plaintiff is liable to the payment of all claims properly filed against said Moran Brothers and said bond by reason of labor or material furnished Moran Brothers. Admits that said plaintiff is not liable to the Bellingham National Bank under its bond on said Maryland Street contract, but in this connection said defendant avers that the moneys due from the City of Bellingham to Moran Brothers under said Maryland Street contract is due and payable to said defendant, The Bellingham National Bank, under and by virtue of its said assignment.

XVII.

Answering paragraph XVII thereof, said defendant states that it is without knowledge concerning the allegations therein contained. In this behalf said defendant avers that it is entitled to have said moneys due under said contract paid to it by virtue of its said assignments sufficient to pay its claim against said Moran Brothers.

XVIII.

Answering paragraph XVIII thereof said defendant states that it is without knowledge concerning the allegations therein contained.

XIX.

Answering paragraph 19 thereof defendant denies the allegations therein and each of them.

XX.

Answering paragraph 20 thereof said defendant denies the allegations therein contained and each of them.

XXI.

Answering paragraph 21 thereof said defendant states that as to the allegations concerning the claims of the other defendants than Moran Brothers and The Bellingham National Bank that it has no knowledge.

Further answering said paragraph said defendant alleges in this connection that it is entitled to have the money due to Moran Brothers paid to it under and by virtue of its assignments sufficient to pay all money advanced by it to said Moran Brothers as hereinafter stated.

FOR A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION AND BY WAY OF COUNTER CLAIM ALLEGES AND STATES AS FOLLOWS:

I.

That on or about the 29th day of July, 1916, said defendants, Al Moran and W. T. Moran, copartners as Moran Bros., entered into a contract with the City of Bellingham for the improvement of Maryland Street from Ellis Street to James Street in the City of Bellingham at the agreed con-

tract price of $5,087.80, said improvement to consist of clearing and paving the asphalt pavement as more particularly appears by a contract entered into under Ordinance of the City of Bellingham No. 2773, creating Local Improvement District No. 519.

That under and by virtue of said contract and for extra work done thereunder, there is a total due in the sum of $5293.09. That said City of Bellingham is a City within the State of Washington.

II.

That to secure the faithful performance of all of the provisions of said contract, said defendant, The City of Bellingham, required said Moran Bros. to make, execute and deliver to it a surety bond conditioned that said Moran Bros. should faithfully perform all the provisions of such contract and pay all laborers, mechanics, sub-contractors and material men, and all persons who should supply said person or persons or sub-contractors with provisions or supplies for the carrying on of said work, all pursuant to the provisions of Sections 1159, 1160 and 1161 as amended, of Remington & Ballinger's Codes of the State of Washington, and that by virtue of said requirement, the plaintiff herein furnished to said City of Bellingham such bond. That the words, terms and conditions of said bond are within the knowledge of said plaintiff herein.

III.

That from time to time during the progress

of said work of improving Maryland street by said Moran Bros., said defendant, The Bellingham National Bank, advanced to said Moran Bros., to aid in the construction and improvement of said street, certain moneys amounting to a total of $3033.15. That to secure the repayment of said sum said defendant required that said Moran Bros. assign and transfer to them all moneys, warrants and bonds to be issued to said Moran Bros., on account of the improvement of said Maryland Street, which assignment was in writing and was in words and figures as follows, to-wit:

"Bellingham, Washington,
"Sept. 11, 1916.

"Chas. A. McLennan,
"City Comptroller:

"Please deliver to The Bellingham National Bank all warrants and bonds to be issued on account of L. I. D. No. 519 Maryland Street from Ellis to James.

"Moran Bros.,
"By Al. Moran."

IV.

That on or about the 11th day of September, 1916, said assignment was duly filed with the City Comptroller of the City of Bellingham, Washington, and was accepted by him and the same has remained on file in said office since said time.

V.

That of said $3033.15 so advanced to said

Moran Bros., by said defendants, The Bellingham National Bank, for the improvement of said Maryland Street, all of said money was used by said defendants Moran Bros., in paying for labor and material used in the improvement of said Maryland Street and that if the same had not been advanced by said defendant, The Bellingham National Bank, to said Moran Bros., said plaintiff would be liable at this time under its bond for an amount equal to the amount advanced by said Bellingham National Bank.

VI.

That of said sum, defendant, The Bellingham National Bank, itself paid, or caused to be paid, the sum of $290.15 to various and sundry laborers who worked for Moran Bros., upon said Maryland Street. Said defendant further avers that Moran Bros. paid out of the moneys advanced by said defendant, The Bellingham National Bank, to Moran Bros., and secured by said asignment, the sum of $1111.20 for sand, gravel, cement and other material furnished by the said Whidby Island Sand & Gravel Co., to said Moran Bros., for the improvement of said Maryland Street, which said $1111.20 is a part of the money due to said bank under and by virtue of said assignment.

Said defendant further avers that Moran Bros. paid out of the moneys advanced by said defendant, the Bellingham National Bank, to Moran Bros., and secured by said assignment, the sum of $133.25 for material furnished by the said

Morse Hardware Co., to said Moran Bros., for the improvement of said Maryland Street, which said $133.25 is a part of the money due to said bank under and by virtue of said assignment.

Said defendant further avers that Moran Bros. paid out of the moneys advanced by said bank to Moran Bros., and secured by said assignment, the sum of $34.50 for material furnished by the said Bellingham Bay Improvement Co. to said Moran Bros., for the improvement of said Maryland Street, which said $34.50 is a part of the money due to said bank under and by virtue of said assignment.

That the remainder of said sum due to said bank under and by virtue of said assignment was paid directly to Moran Bros., and by them used to pay for labor and material employed and used in the construction of said Maryland Street.

Answering plaintiff's second cause of action, said defendant, the Bellingham National Bank, denies and alleges as follows:

I.

Answering paragraph I thereof said defendant admits the same.

II.

Answering paragraph II thereof said defendant admits that said contract has been substantially completed; admits that no payments have been made to Moran Bros., or to those furnishing material or labor in said contract; admits that the full amount of the contract price, to-wit: $3135 remains in the hands of the City of Bellingham.

Further answering said paragraph said defendant denies each and every other allegation therein contained not in this paragraph admitted.

III.

Answering paragraph III thereof said defendant admits that said defendants, Moran Bros., sold, assigned, transferred and set over unto said defendant, The Bellingham National Bank, all warrants, vouchers or bonds to be used in payment of the contract of said defendants, Moran Bros., for advances made by said bank to said Moran Bros.

IV.

Answering paragraph IV thereof said defendant, The Bellingham National Bank, avers that its claim under and by virtue of said assignment as against the bonds and warrants due Moran Bros. on said contract amounts to $1781.07, with interest on $1274.12 from May 2, 1917, at the rate of 8% per annum, and $506.95 thereof from May 9th, 1917, with interest thereon at 8% per annum.

Further answering said paragraph with reference to the claims against said Moran Bros., on said contract said defendant states that it has no knoweldge.

V.

Answering paragraph V thereof said defendant admits that plaintiff is liable to the payment of all proper claims that have been filed with the City of Bellingham against said bond within thirty days after the acceptance thereof, but as to the amount of said claims it states that it has no knowledge.

VI.

Answering paragraph VI thereof said defendant states that it has no knowledge as to the allegations therein contained.

VII.

Answering paragraph VII thereof defendant denies the same and each and every allegation therein contained.

FOR A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION AND BY WAY OF COUNTER CLAIM, ALLEGES AND STATES AS FOLLOWS:

I.

That on or about the 22nd day of September, 1916, the City of Bellingham entered into a contract with defendants, Al Moran and W. T. Moran, co-partners as Moran Bros., for the improvement of Iowa Street from James Street to Woburn Street, in the City of Bellingham, by clearing and grubbing, laying concrete walks and sewers; being known as Local Improvement District No. 527 of the City of Bellingham, Washington, for the agreed compensation of $3,135.00 and that plaintiff, American Surety Company of New York, pursuant to the provisions of Sections 1159, 1160 and 1161 as amended, of Remington & Ballinger's Codes of the State of Washington, in order to secure the performance of said contract, and the payment of all laborers, mechanics, subcontractors and materialmen, and all persons who shall supply such person

or persons or sub-contractors with materials, supplies and provisions for the carrying on of such work, as surety for said Al Moran and W. T. Moran, executed a bond running to the State of Washington, on or about September 20, 1916, in the penal sum of $3,135.00, and said bond and contract were accepted by the City of Bellingham, and said bond is kept and held by the City of Bellingham as security for the performance of said contract, and is in full force, effect and virtue.

II.

That under and by virtue of said contract and for extra work done thereunder, there is a total due in the sum of $3135.00. That said City of Bellingham is a City within the State of Washington.

III.

That from time to time during the progress of said work of improving Iowa Street by said Moran Bros., said defendant The Bellingham National Bank, advanced to said Moran Bros., to aid in the construction and improvement of said street, certain moneys amounting to a total of $1781.07. That to secure the repayment of said sum said defendant required that said Moran Bros. assign and transfer to them all moneys, warrants and bonds to be issued to said Moran Bros., on account of the improvement of said Iowa Street, which assignment was in writing and was in words and figures as follows, to-wit:

Bellingham, Washington.
Oct. 20, 1916.

Chas. A. McLennan,
City Comptroller,
City of Bellingham, Washington.

Dear Sir:—

Please deliver to the Bellingham National Bank all warrants or bonds to be issued on account of L. I. D. No. 527, Iowa Street from James to Woburn St.

Moran Bros.,
By W. T. Moran.

IV.

That on or about the 20th day of October, 1916, said assignment was duly filed with the City Comptroller of the City of Bellingham, Washington, and was accepted by him and the same has remained on file in said office since said time.

V.

That of said $1781.07 so advanced to said Moran Bros., by said defendant, The Bellingham National Bank, for the improvement of said Iowa Street, all of said money was used by said defendants Moran Bros. in paying for labor and material used in the improvement of said Iowa Street and that if the same has not been advanced by said defendant, the Bellingham National Bank, to said Moran Bros., said plaintiff would be liable at this time under its bond for an amount equal to the amount advanced by said Bellingham National Bank.

VI.

That of said sum, defendant, The Bellingham National Bank, itself paid or caused to be paid the sum of $1024.80 to various and sundry laborers who worked for Moran Bros., upon said Iowa Street.

Said defendant further avers that Moran Bros. paid out of the moneys advanced by said bank to Moran Bros., and secured by said assignment, the sum of $41.25 for material furnished by the said Bellingham Bay Improvement Co., to said Moran Bros., for the improvement of said Iowa Street, which said $41.25 is a part of the money due to said bank under and by virtue of said assignment.

VII.

That the remainder of said sum due to said bank under and by virtue of said assignment was paid directly to Moran Bros., and by them used to pay for labor and material employed and used in the construction of said Iowa Street.

WHEREFORE, said defendant prays that the temporary restraining order entered herein restraining the City of Bellingham from paying said warrants due under said contract, be dissolved and that said City of Bellingham be authorized, instructed, adjudged and decreed to pay to said defendant, the Bellingham National Bank, out of the bonds or warrants due from defendant, City of Bellingham, to Moran Bros., under the Maryland Street contract set forth in plaintiff's first cause of action herein, the sum of $3033.15, with interest on $600 thereof from September 11, 1916, at 8% per an-

num; $1862.60 thereof with interest at 8% per annum from March 2, 1917, and $570.55 thereof with interest at 8% per annum from April 12, 1917, and that said defendant, City of Bellingham, be authorized, instructed, adjudged and decreed to pay to said defendant, The Bellingham National Bank, out of the bonds and warrants due to Moran Bros., for the work done by them in the improvement of Iowa Street as set forth in Plaintiff's second cause of action herein in the sum of $1781.07, with interest on $1274.12 thereof at 8% per annum from May 2, 1917, and $506.95 thereof with interest at 8% per annum from May 9, 1917, and that said defendants recover of the plaintiff its costs and disbursements herein and that said defendant be decreed such other and further relief as to the court may seem just, right and equitable in the premises.

SATHER & LIVESEY,

Attorneys and solicitors for the Defendant, The Bellingham National Bank, Bellingham, Washington.

State of Washington, County of Whatcom. ss.

VICTOR A. ROEDER being first duly sworn on his oath, deposes and says: That he is the President of The Bellingham National Bank, one of the defendants above named; that he makes this verification for and on behalf of said defendant; that he has read the foregoing Answer; knows the contents thereof and believes the same to be true.

VICTOR A. ROEDER.

Subscribed and sworn to before me this 9th day of June, 1917.

GEORGE LIVESEY,

(NOTARIAL SEAL) Notary Public in and for the State of Washington, residing at Bellingham.

(Service admitted and copy received this 9th day of June, 1917. Kellogg & Thompson and Hasting & Stedman, Attorneys and Solicitors for Plaintiff.)

(Indorsed: Answer of Defendant The Bellingham National Bank filed in the U. S. District Court Western Dist. of Washington, Northern Division, June 11, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Deputy.)

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 9 E.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Plaintiff,

vs.

AL MORAN and W. T. MORAN, co-partners doing business as MORAN BROTHERS; THE CITY OF BELILNGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a

corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation.

Defendants.

Answer of Morse Hardware Co. to Bill of Complaint.

The Answer of MORSE HARDWARE COMPANY, a corporation, to the Bill of Complaint exhibited against it by the above named Complainant, respectfully showeth:

This answering defendant now and at all times herein, reserving and saving to itself all and all nature of benefits and advantages or exceptions which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto or unto so much or such parts thereof as this defendant is advised that it is material or neressary for it to make answer unto, answering says:

1.

Answering the allegations contained in the 1st, 2nd, 3rd, 4th and 7th paragraphs of said Bill of Complaint, this answering defendant admits the same.

2.

As to the allegations contained in the para-

graphs of said bill of complaint other than as above admitted, down to and including paragraph 22 of said bill of complaint, this answering defendant disclaims any interest.

3.

Answering the allegations contained in Complainant's second cause of action beginning with paragraph 1 on page 6 of said bill of complaint, this answering defendant admits the allegations of paragraphs 1, 2 and 5 of said second cause of action, except that it denies the allegation in paragraph 2 that the improvement of Iowa Street has been accepted by the City of Bellingham, and denies that the claims filed against said work exceed the amount due upon the contract therefor.

4.

Answering the allegations contained in paragraph 4 of said second cause of action, this answering defendant says:

That it has a claim against said Moran Brothers and the complainants herein as surety, upon the bond of said Moran Brothers, in the sum of Eight Hundred Seventy-nine Dollars Fifty-five cents ($879.55) for materials and supplies furnished and used in the work of improving Iowa Street from James Street to Woburn Street, in the City of Bellingham, Washington, under the contract between the said defendant Moran Brothers, and the defendant City of Bellingham, and that it did on the 17th day of May, 1917, pursuant to the statutes of the State of Washington in such case made and

provided, file a notice with the City Comptroller and Ex-officio Clerk of said City of Bellingham, in words and figures as follows, to-wit:

"In the Matter of the Improvement of Iowa Street, in the City of Bellingham, Washington, and the laying down of cement sidewalks on the North side thereof.

To the City of Bellingham,
Whatcom County, Washington.

NOTICE IS HEREBY GIVEN that the undersigned Morse Hardware Company, a corporation, has a claim in the sum of One Thousand and Twenty-three and Forty-three hundredths Dollars ($1023.43) against the Bond taken from Moran Brothers as principal, and American Surety Company of New York, as surety, for the work of laying down concrete sidewalks on the North side of Iowa Street in said city, and such other work as incident thereto under a contract entered into by said City on one part and the above named Moran Brothers on the other part, which said claim is for materials and supplies furnished to said Moran Brothers to be used and was used in the performance of said work and labor.

Morse Hardware Company,
By R. I. Morse, President."

That subsequent to the filing of said claim there was paid on account thereof the sum of $43.88, leaving the balance of Nine Hundred Seventy-nine Dollars Fifty-five Cents ($979.55) due and owing

to plaintiff, the whole of which remains wholly unpaid.

WHEREFORE this answering defendant prays that its claim in the sum of $979.55 be by decree of this court allowed and established, and that it have judgment for the payment of the same against the complainant herein, together with its costs in this behalf laid out and expended, and such other and further relief as to this honorable court may seem meet and equitable in the premises.

HADLEY & ABBOTT,
Attorneys for Defendant Morse Hardware Co.

State of Washington, County of Whatcom. ss.

R. I. Morse being first duly sworn on oath deposes and says: that he is the president of Morse Hardware Company, the answering defendant above named; that he makes this verification for and on behalf of said answering defendant; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

R. I. MORSE.

Subscribed and sworn to before me this 8th day of June, 1917.

A. M. HADLEY,
(SEAL) Notary Public in and for the State of Washington, residing at Bellingham, in said State.

(Service of the within Answer is hereby acknowledged and admitted, and copy thereof received this 9th day of June, 1917, at Bellingham, Wash. Kellogg & Thompson, Att'ys for Complainant.)

(Indorsed: Answer of Morse Hardware Co. to Bill of Complaint. Filed in the U. S. District Court Western District of Washington, Northern Division. June 11, 1917. By Ed M. Lakin, Deputy.)

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 9 E.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

Answer of E. K. Wood Lumber Company, a Corporation, to Bill of Complaint.

The answer of E. K. Wood Lumber Company, a Corporation, to the Bill of Complaint exhibited against it by the above named complainant, respectfully showeth:

This answering defendant now and at all times herein, reserving and saving to itself all and all nature of benefits and advantages or exceptions which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto or unto so much or such parts thereof as this defendant is advised that it is material or necessary for it to make answer unto, answering says.

1.

Answering the allegations contained in the 1st, 2nd, 3rd, 4th and 7th paragraphs of said Bill of Complaint, this answering defendant admits the same.

2.

As to the allegations contained in the paragraphs of said Bill of Complaint other than as above admitted, down to and including paragraph 22 of said Bill of Complaint, this answering defendant disclaims any interest.

3.

Answering the allegations contained in complainant's second cause of action beginning with paragraph 1 on page 6 of said Bill of Complaint,

this answering defendant admits the allegations of paragraphs 1, 2 and 5 of said second cause of action, except that it denies the allegation in paragraph 2 that the improvement of Iowa Street has been accepted by the City of Bellingham, and denies that the claims filed against said work exceed the amount due upon the contract therefor.

4.

Answering the allegations contained in paragraph 4 of said second cause of action, this answering defendant says:

That it has a claim against said Moran Brothers, and the complainant herein as surety, upon the bond of said Moran Brothers, in the sum of One Hundred Eighteen Dollars, Sixteen Cents ($118.16) for lumber and materials furnished and used in the work of improving Iowa Street from James Street to Woburn Street, in the City of Bellingham, Washington, under the contract between the said defendant, Moran Brothers, and the defendant, City of Bellingham, and that it did, on the 26th day of May, 1917, pursuant to the statutes of the State of Washington in such case made and provided, file a notice with the City Comptroller and Ex-Officio Clerk of said City of Bellingham, in words and figures as follows, to-wit:

"To the City of Bellingham:

Notice is hereby given that the undersigned, E. K. Wood Lumber Company, a corporation, has a claim in the sum of One Hundred Eighteen Dollars Sixteen Cents ($118.16) against the Bond taken

from Al Moran and W. T. Moran, co-partners as Moran Brothers, as principals, and American Surety Compay of New York, as surety, for the work of clearing, grubbing and laying concrete walks and sewers on Iowa Street, from James Street to Woburn Street in the City of Bellingham, said claim being for lumber furnished and used in said work.

E. K. Wood Lumber Company ,
By F. J. Wood, Manager."

State of Washington, County of Whatcom.—ss.

F. J. Wood being first duly sworn on oath says, that he is manager of E. K. Wood Lumber Company, the corporation above named; that the above and foregoing notice and statement of account is true as he verily believes. F. J. Wood.

Subscribed and sworn to before me this 25th day of May, 1917. H. F. Vincent,

(Seal) Notary Public in and for the State of Washington, residing at Bellingham, in said State.

And that said claim remains due and wholly unpaid.

WHEREFORE this answering defendant prays that its claim in the said sum of $118.16 be by decree of this court allowed and established and that it have judgment for the payment of the same against the complainant herein, together with its costs in this behalf laid out and expended, and such other and further relief as to this Honorable Court may seem meet and equitable in the premises.

HADLEY & ABBOTT,
Attorneys for Defendant E. K. Wood Lumber Co.

State of Washington, County of Whatcom.—ss.

Fred J. Wood being first duly sworn on his oath deposes and says, that he is the resident manager and agent of E. K. Wood Lumber Company, the answering defendant above named; that he makes this verification for and on behalf of said answering defendant; that he has read the foregoing answer, knows the contents thereof and believes the same to be true

FRED J. WOOD.

Subscribed and sworn to before me this 8th day of June, 1917.

A. M. HADLEY,

(Seal) Notary Public in and for the State of Washington, residing at Bellingham, in said State.

(Service of the within answer is hereby acknowledged and admitted and copy thereof received this 9th day of June, 1917, at Bellingham, Wash. Kellogg & Thompson, Attorneys for Complainant.)

(Indorsed: Answer E. K. Wood Lbr. Co. to Bill of Complaint. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 11, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9 E.

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners, doing business as Moran Brothers; THE CITY OF BELINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE-GRIMSHAW COMPANY, a corporation, *Defendants.*

Answer.

To the Honorable Jeremiah Neterer, Judge of the Above Entitled Court:

Comes now the defendant City of Bellingham, a municipal corporation of the first class of the State of Washington, and for answer to the above entitled cause as set forth in the Bill of Complaint on file in the above entitled court, denied, admits and alleges as follows:

I.

Answering paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of said Bill of Complaint, defendant City admits the same.

II.

Answering paragraph 15 of said bill of complaint, defendant city admits that said Al Moran and W. T. Moran, co-partners doing business as Moran Bros., have assigned to the Bellingham National Bank all sums coming to them under said contract; which said money due from said City of Bellingham as trustee for Local Improvement District No. 519 is in the sum of $5,293.09; but defendant City denies that it has any knoweldge or information sufficient to form a belief as to any of the other allegations contained in said paragraph 15.

III.

Answering paragraph 16 of said bill of complaint, defendant City admits that said plaintiff is liable for the payment of all said claims admitted by said plaintiff in said paragraph, but denies that it has any knowledge or information sufficient to form a belief as to the liability of plaintiff on the claim of the Bellingham National Bank under the said bond.

IV.

Answering paragraph 17 of said bill of complaint, defendant city denies the same and each and every part thereof, and alleges the fact to be: That it is holding the money under an order of this court *pendente lite.*

V.

Answering paragraphs 18, 19 and 20 of said bill of complaint, defendant city denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph.

VI.

Answering paragraph 21 of said bill of complaint, defendant city denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in said paragraph 21, but avers the fact to be: That it does not know, and is unable to determine, to whom such funds belong and desires to turn said funds into this court for distribution by this court according to the rights of the various claimants therefor.

VII.

Answering paragraph 22 of said bill of complaint, defendant city denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph.

DEFENDANT CITY OF BELLINGHAM ANSWERING THE SECOND CAUSE OF ACTION OF SAID PLAINTIFF AS SET OUT IN SAID BILL OF COMPLAINT, DENIES, ADMITS AND ALLEGES AS FOLLOWS:

I.

Answering paragraph 1 of said Second Cause of Action, defendant city admits the same.

II.

Answering paragraph 2 of said second cause of action, defendant city admits that it has not paid said Moran Bros., or anyone in their behalf, or at all, anything on the said contract for the improvement of Iowa Street, but denies each and every other allegation in said paragraph set forth and avers the facts to be: That said work is but partially completed and has been abandoned by said Moran Bros. and that defendant city has notified said plaintiff, American Surety Company, that it looks to said company to immediately proceed and complete said work as provided in said bond and contract, which by the terms of said bond is made a part thereof, and that the said American Surety Company, plaintiff herein, has so far failed, neglected and refused to proceed therewith, to the great damage of defendant city and the property owners in said local improvement district; and defendant further avers, that under the terms of its said contract, no moneys or securities are due and payable until said work is fully completed and accepted by defendant City of Bellingham.

III.

Answering paragraph 3 of said second cause of action, defendant city admits that defendants Moran Bros. did sell or purport to sell and assign, transfer and set over to the Bellingham National Bank the warrants and bonds to be issued by it in payment of said contract; but denies that it has any knowledge or information sufficient to

orable court as it may determine meet and proper.

VIII.

Answering paragraph 8 of said second cause of action, defendant city denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph.

IX.

Answering paragraph 9 of said second cause of action, defendant city admits the same.

FURTHER ANSWERING SAID COMPLAINT OF PLAINTIFF HEREIN AND AS AN AFFIRMATIVE DEFENSE THERETO, DEFENDANT CITY OF BELLINGHAM ALLEGES AS FOLLOWS, TO-WIT:

I.

That at all times hereinafter mentioned the defendant City of Bellingham was, and now is, a municipal corporation of the first class of the State of Washington.

II.

That at all times hereinafter mentioned said plaintiff, American Surety Company of New York was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York and is duly authorized to transact business in the State of Washington as a surety company.

III.

That on or about the 20th day of September, 1916, said American Surety Company did execute as a surety, a surety bond in the sum of Three

Thousand One Hundred Thirty-five and no-100 ($3135.00) Dollars, in which Al Moran and W. T. Moran, co-partners doing business under the firm name and style of Moran Bros., were principals and said American Surety Company were surety thereon; which bond ran to the City of Bellingham and the State of Washington to secure the faithful performance by said principals therein of a certain contract and all the terms and conditions thereof, which said principals had entered into with the City of Bellingham on or about the said 20th day of September, 1916, for the improvement of Iowa Street from James Street to Woburn Street by clearing and grubbing portions of the same and laying a concrete sidewalk on the northerly side thereof, together with necessary sewers, and to secure the payment of all laborers, mechanics, subcontractors and material men and all persons who should supply such contractors or sub-contractors with material, supplies and provisions for the carrying on of said work; which bond is still in full force and effect.

IV.

That under and by virtue of the terms of said contract, said Moran Bros. were to complete said work on or before the 1st day of December, 1916, and that in the event of their failure so to do, the City of Bellingham was to retain from said contract price as liquidated damages for said Moran Bros.' failure to perform said contract within the time above set forth, the sum of Seven and 50-100 ($7.50)

Dollars per day for each and every day thereafter that said Moran Bros. failed, neglected or refused to complete said contract; that said work is still uncompleted to the great damage of the City of Bellingham, in the sum of One Thousand Four Hundred and Forty Dollars ($1440.00), together with the further sum of Seven and 50-100 ($7.50) Dollars per day until said work is fully completed.

Wherefore, Defendant City of Bellingham Prays as Follows:

1st: That as to said first cause of action, that at the time provided by law for the issuance of bonds and the drawing of warrants for the payment of the work so done by Moran Bros. for the improvement of Maryland Street, it be permitted to tender into the registry of this court the moneys due under said contract to said Moran Bros., to be distributed by this court to the various claimants therefor as to the court shall seem meet and equitable.

2nd: That as to the second cause of action, it be permitted to go hence without delay and that it recover its costs and disbursements herein.

3rd: That as to its affirmative defense and cross complaint, it be given judgment against said Al Moran and W. T. Moran, doing business under the firm name and style of Moran Bros., and the American Surety Company, a corporation, in the sum of One Thousand Four Hundred Forty ($1440.00) Dollars, as its damages for delay in the completion of said contract, together with the

further sum of Seven and 50-100 ($7.50) Dollars per day until said work is fully completed.

DAN F. NORTH,

Attorney for Defendant City of Bellingham.

State of Washington, County of Whatcom.—ss.

A. M. Muir, being first duly sworn on oath, says that he is the Mayor of defendant City of Bellingham named in the foregoing Answer, that he has read the same, knows the contents thereof, and that the allegations therein contained are true as he verily believes.

A. M. MUIR.

Subscribed and sworn to before me this 11th day of June, A. D. 1917.

(Notarial Seal) DAN F. NORTH,

Notary Public in and for the State of Washington, Residing at Bellingham.

(Service of the within Answer is hereby admitted and acknowledged, and a copy thereof received this 11th day of June, A. D. 1917. Kellogg & Thompson, Attorneys for Complainant.)

(Indorsed: Answer, City of Bellingham. Filed in the U. S. District Court, Western District of Washington, Northern Division, October 2nd, 1917. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 9 E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as MORAN BROTHERS; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

Answer of Morrison Mill Co. to Bill of Complaint.

The Answer of Morison Mill Company, a corporation, to the Bill of Complaint exhibited against it by the above named Complainant, respectfully showeth:

This answering defendant now and at all times herein, reserving and saving to itself all and all nature of benefits and advantages or exceptions which may be had or taken to the many errors,

uncertainties, imperfections and insufficiencies in the Complainant's said Bill of Complaint contained, for answer thereunto or unto so much or such parts thereof as this defendant is advised that it is material or necessary for it to make answer unto, answering says:

1.

Answering the allegations contained in the 1st, 2nd, 3rd, 4th and 7th paragraphs of said Bill of Complaint, this answering defendant admits the same.

2.

As to the allegations contained in the paragraphs of said Bill of Complaint other than as above admitted, down to and including paragraph 22 of said Bill of Complaint, this answering defendant disclaims any interest.

3.

Answering the allegations contained in Complainant's second cause of action, beginning with paragraph 1 on page 6 of said Bill of Complaint, this answering defendant admits the allegations of paragraphs 1, 2 and 5 of said second cause of action, except that it denies the allegation in paragraph 2 that the improvement of Iowa Street has been accepted by the City of Bellingham, and denies that the claims filed against said work exceed the amount due upon the contract therefor.

4.

Answering the allegations contained in paragraph 4 of said second cause of action, this answering defendant says:

That it has a claim against said Moran Brothers in the sum of Seventy-five Dollars Sixteen Cents ($75.16) for lumber furnished and used in the work of improving Iowa Street from James Street to Woburn Street, in the City of Bellingham, Washington, under the contract between the said defendant Moran Brothers and the defendant City of Bellingham, and that it did, on the 6th day of June, 1917, pursuant to the statutes of the State of Washington in such case made and provided, file a notice with the City Comptroller and Ex-officio Clerk of said City of Bellingham, in words and figures as follows, to-wit:

"To the City of Bellingham, Washington:

Notice is hereby given that the undersigned Morrison Mill Compony, a corporation, has a claim in the sum of $75.16 against the bond taken from Al Moran and W. T. Moran, co-partners as Moran Brothers, as principal, and American Surety Company of New York as surety, for the work of clearing, grubbing and laying concrete walks and sewers on Iowa Street from James Street to Woburn Street, in the City of Bellingham, said claim being for lumber furnished and used in said work.

MORRISON MILL COMPANY,

By Archie Morrison, Manager.

State of Washington, County of Whatcom.—ss.

Archie Morrison being first duly sworn on oath says, that he is manager of Morrison Mill Company, the corporation above named; that the

above and foregoing claim and statement of account is true as he verily believes.

ARCHIE MORRISON.

Subscribed and sworn to before me this 4th day of June, 1917.

A. M. HADLEY,

(Seal) Notary Public in and for the State of Washington, residing at Bellingham, in said State.

And that said claim remains due and wholly unpaid.

WHEREFORE, this answering defendant prays that its claim in the said sum of $75.16 be by decree of this court allowed and established and that it have judgment for the payment of the same against the complainant herein, together with its costs in this behalf laid out and expended, and such other and further relief as to this Honorable Court may seem meet and equitable in the premises.

HADLEY & ABBOTT,

Attorneys for Defendant Morrison Mill Company.

State of Washington, County of Whatcom.—ss.

Archie Morrison, being first duly sworn on oath deposes and says, that he is the manager of Morrison Mill Company, the answering defendant above named; that he makes this verification for and on its behalf; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

ARCHIE MORRISON.

Subscribed and sworn to before me this 8th day of June, 1917.

A. M. HADLEY,

(Seal) Notary Public in and for the State of Washington, residing at Bellingham, in said State.

(Service of the within Answer is hereby acknowledged and admitted, and copy thereof received this 9th day of June, 1917, at Bellingham, Washington. Kellogg & Thompson, Attorneys for Complainant.)

(Indorsed: Answer of Morrison Mill Company to Bill of Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 11, 1917. Frank L. Crosby, Clerk, by Ed M. Lakin, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9 E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a cor-

poration organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE-GRIMSHAW COMPANY, a corporation, *Defendants.*

Answer of K. Sauset to Bill of Complaint.

The Answer of K. Sauset to the Bill of Complaint exhibited against him by the above named complainant respectfully shows:

This answering defendant for answer unto so much or such parts of the Bill of Complaint herein as this defendant is advised that it is material or necessary for it to make answer thereto, answering says:

Answering the allegations contained in the 1st, 2nd, 3rd, 4th, 9th, 11th, 12th and 13th paragraphs of said Bill of Complaint, this answering defendant admits the same.

II.

Answering paragraph 14 of said Bill of Complaint this answering defendant alleges that he disclaims all interest in and to the allegations contained in said paragraph, except that this defendant alleges that he has a claim against said Moran Brothers and the complainant herein as surety upon the bond of said Moran Brothers in the sum of $2,125,36, for labor and materials furnished and

used in the work of improving Maryland Street from Ellis Street to James Street in the City of Bellingham, Washington, known as Local Improvement District No. 519, and that on or about the 15th day of May, 1917, pursuant to the statutes of the State of Washington in such cases made and provided, he filed a notice with the City Comptroller and Ex-officio Clerk of the City of Bellingham, Washington, in words and figures as follows, to-wit:

Bellingham, Washington, May 15th, 1917.

To the City Comptroller, City Treasurer, Mayor and City Council of the City of Bellingham, Washington:

NOTICE IS HEREBY GIVEN that the undersigned, K. Sauset, has a claim in the sum of $2125.36 against the bond taken from Moran Brothers, principal, and the American Surety Company of New York, surety, for the work of improving Maryland Street from Ellis Street to James Street, known as Local Improvement District No. 519, of the Local Improvement Districts of the City of Bellingham, Washington, by paving the same with asphalt upon concrete base, etc., that said claimant did furnish labor and materials to the said principal under said bond and there remains unpaid to them on account thereof the amount above stated, to-wit, $2125.36.

Signed: K. Sauset.

That no part of the amount stated in said notice has been paid to this answering defendant, and that there is now due and owing to this de-

fendant a balance for and on account of the labor and materials so furnished, in the sum of $2125.36.

III.

Answering paragraph 15 of said Bill of Complaint this defendant disclaims any interest in the matters alleged in said paragraph.

IV.

Answering paragraph 16 of said Bill of Complaint, this defendant admits that the plaintiff is liable to this defendant in the amount hereinbefore stated.

V.

Answering paragraphs 17, 18, 19, 20 and 21, this defendant disclaims any interest in and to the matters alleged in said paragraphs except that this answering defendant alleges that he has filed a claim against Moran Brothers and the complainant herein as hereinbefore set forth, and that this answering defendant alleges that he is willing and ready to present his claim to the above entitled Court, and to make proof thereof.

VI.

Answering paragraph 22 of said Bill of Complaint, this answering defendant admits the same.

VII.

Answering the allegations contained in complainant's second cause of action, this answering defendant admits the allegations of paragraphs 1, 2 and 5, of said second cause of action, except that he denies the allegations in paragraph 2 thereof that the improvement of Iowa Street has been accepted by the City of Bellingham.

VIII.

Answering paragraph 4 of said second cause of action, this answering defendant alleges that he has a claim against the said Moran Brothers and the complainant herein as surety upon the bond of said Moran Brothers in the sum of $90.00 for material and supplies and the rental of equipment furnished and used in the work of improving Iowa Street, from James Street to Woburn Street, in the City of Bellingham, Washington, under the contract between said defendant Moran Brothers and the defendant City of Bellingham, being known as Local Improvement District No. 527. That he has not filed any notice with the City Comptroller of his claim against said Moran Brothers and the complainant herein for said amount for the reason that the improvement of said street has not been accepted by the City of Bellingham, but this answering defendant alleges that he is ready and willing to appear in this Court and make proof of the amount and justness of his said claim and demand as herein alleged.

IX.

This answering defendant disclaims all interest in and to the allegations contained in said second cause of action.

WHEREFORE this answering defendant prays that his claim in the total sum of $2,215.36 be by decree of this court allowed and established and that he have judgment for the payment of the same against the complainant herein, together with

his costs in this behalf laid out and expended, and for such other and further relief as to this honorable court may seem meet and equitable in the premises.

KELLOGG & THOMPSON,
Attorneys for Defendant K. Sauset.

State of Washington, County of Whatcom.—ss.

K. Sauset, being first duly sworn on oath, says: That he is one of the defendants named in the within entitled action; that he has read the above and foregoing Answer, knows the contents thereof, and that the same is true, as he verily believes.

K. SAUSET,.

Subscribed and sworn to before me this 28th day of June, 1917.

JOHN A. KELLOGG,
(Seal) Notary Public for Washington,
Residing at Bellingham.

(Indorsed: Answer, K. Sauset. Filed in the U. S. District Court, Western District of Washington, Northern Division, October 2nd, 1917. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

Answer of Caine Grimshaw Company, a Corporation, to Bill of Complaint.

The Answer of Caine Grimshaw Company, a corporation, to the Bill of Complaint exhibited against it by the above named complainant respectfully shows:

This answering defendant for Answer unto so much or such parts of the Bill of Complaint herein as this defendant is advised that it is material or

necessary for it to make answer thereto, answering says:

I.

Answering the allegations contained in the 1st, 2nd, 3rd, 4th, 10th, 11th, 12th and 13th paragraphs of said Bill of Complaint, this answering defendant admits the same.

II.

Answering paragraph 14 of said Bill of Complaint, this answering defendant alleges that it disclaims all interest in and to the allegations contained in said paragraph, except that this defendant alleges that it has a claim against said Moran Brothers and the complainant herein as surety upon the bond of said Moran Brothers, in the sum of $1,268.19, for materials and supplies furnished and used in the work of improving Maryland Street, from Ellis Street to James Street, in the City of Bellingham, known as Local Improvemnet District No. 519, and that it did on the 28th day of November, 1916, pursuant to the statutes of the State of Washington, in such case made and provided, file a Notice with the City Comptroller and Ex-officio Clerk of the City of Bellingham, in words and figures as follows, to-wit:

Bellingham, Wash., November 27, 1916.

See Remington & Ballinger Codes and Statutes of the State of Washington, Volume No. 1, Section 1161. Also Chapter 28 of Session Laws of 1915.

To the Board of Public Works, City Council and
City Comptroller, Bellingham, Wash.

Notice is hereby given that the undersigned, Caine-Grimshaw Company, has a claim in the sum of Twelve Hundred Sixty-eight and 19-100 Dollars ($1268.19) and interest at 8% from December 1st, 1916, until claim is paid against the bond taken from Moran Bros., contractors, Bellingham, Washington, and the American Surety Company of New York, N. Y., for the furnishing of cement for the concrete base of the pavement of Maryland Street. Said pavement extending on Maryland Street from Ellis Street to James Street in the City of Bellingham. Known as Local Improvement District No. 519. Contract let July 24th 1916.

Signed: Caine Grimshaw Company.
Per P. H. Browne, Mgr.

That no part of the amount stated in said Notice has been paid to this answering defendant, and there is now a balance due and owing to this defendant on account of the materials and supplies so furnished, of $1,268.19.

III.

Answering paragraph 15 of said Bill of Complaint this defendant disclaims any interest in the matters alleged in said paragraph.

IV.

Answering paragraph 16 of said Bill of Complaint, this defendant admits that the plaintiff is liable to this defendant in the amount heretofore stated.

V.

Answering paragraphs 17, 18, 19, 20 and 21, this defendant disclaims any interest in and to the matters alleged in said paragraphs, except that this answering defendant alleges that it has filed a claim against Moran Brothers and the complainant herein as heretofore set forth, and this answering defendant alleges that it is willing and ready to present this claim to the above entitled Court and to make proof thereof.

VI.

Answering the paragraph 22 of said Bill of Complaint, this answering defendant admits the same.

VII.

Answering the allegations contained in complainant's second cause of action, this answering defendant admits the allegations of paragraphs 1, 2 and 5, of said second cause of action, except that it denies the allegation in paragraph 2 that the improvement of Iowa Street has been accepted by the City of Bellingham.

VIII.

Answering paragraph 4 of said second cause of action, this answering defendant says that it has a claim against the said Moran Brothers and the complainant herein as surety upon the bond of said Moran Brothers, in the sum of $47.28 for materials and supplies furnished and used in the work of improving Iowa Street from James Street to Woburn Street, in the City of Bellingham, Wash-

ington, under the contract between the said defendant Moran Brothers and the defendant City of Bellingham, being known as Local Improvement District No. 527. That it has not filed any notice with the City Comptroller of its claim against said Moran Brothers, and the complainant herein, for the reason that the improvement of said street has not been accepted by the city, but this answering defendant alleges that it is willing and ready to appear in this Court and make proof of the amount and justness of its said claim and demand as above alleged.

IX.

This answering defendant disclaims all interest in and to the other allegations contained in said second cause of acton.

WHEREFORE, this answering defendant prays that its claim in the total sum of $1,315.47 be by decree of this Court allowed and established, and that it have judgment for the payment of the same against the complainant herein, together with its costs in this behalf laid out and expended, and for such other and further relief as to this Honorable Court may seem meet and equitable in the premises.

KELLOGG & THOMPSON,
Attorneys for Defendant Caine Grimshaw Company.

State of Washington, County of Whatcom.—ss.

P. H. Browne, being first duly sworn on oath, deposes and says: That he is the manager of the Caine Grimshaw Company, a corporation, the an-

swering defendant above named. That he makes this verification for and on behalf of said answering defendant. That he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

P. H. BROWNE.

Subscribed and sworn to before me this 27th day of June, 1917.

JOHN A. KELLOGG,

(Seal) Notary Public For Washington
Residing at Bellingham.

(Indorsed: Answer, Caine-Grimshaw Co., a corporation, to Bill of Complaint. Filed in the District Court, Western District of Washington, Northern Division, October 2nd, 1917. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corpora-

tion organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

JOHN BIEKERT, NORMAN TRANSFER, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, and THOMAS M. LYNN & M. J. WILLIAMS, co-partners as LYNN & WILLIAMS,

Additional Defendants.

Amended Bill of Complaint.

To the Honorable Jeremiah Neterer, Judge of the Above Entitled Court:

Comes now the above named plaintiff, and petitions this Honorable Court for leave to file its amended bill of complaint herein bringing in additional parties hereto as follows, to-wit:

John Biekert, Norman Transfer, Frank Middlestadt, John Kastner, Sam Sevier, Bellingham Concrete Works, W. M. Seeger, and Thomas M. Lynn & M. J. Williams, co-partners as Lynn & Williams.

1.

That at all times herein mentioned said plaintiff, American Surety Company of New York, was,

and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and was and is a resident and citizen of the State of New York, and is duly authorized to transact business in the State of Washington, and has paid its annual license fees last due to the State of Washington.

2.

That at all times herein mentioned, the above named defendants, Al Moran and W. T. Moran, were, and still are, co-partners doing business under the firm name and style of Moran Bros., and were both residents and citizens of the State of Washington, and of the Western District thereof, residing at the City of Bellingham, in Whatcom County, Washington.

3.

That at all times herein mentioned, the defendant, City of Bellingham, was, and still is, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington.

4.

That at all times herein mentioned, the defendant, Bellingham National Bank, was, and still is, a corporation organized and existing under the national banking act of the United States of America, and was a citizen and resident of the State of Washington, and of the Western District thereof, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

5.

That at all times herein mentioned, Morse Hardware Company was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Washington and was, and still is, a resident and citizen of the State of Washington, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

6.

That at all times herein mentioned, defendant, Whidby Island Sand & Gravel Company, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Washington, and was, and still is, a resident and citizen of the State of Washington, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

7.

That at all times herein mentioned, defendant, E. K. Wood Lumber Company, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Washington, and was, and still is, a resident and citizen of the State of Washington, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

8.

That at all times herein mentioned defendant, Morrison Mill Company, was, and still is, a corporation organized and existing under and by virtue

of the laws of the State of Washington, and was, and still is, a resident and citizen of the State of Washington, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

9.

That at all times herein mentioned defendant, K. Sauset, was, and still is, a resident and citizen of the State of Washington, having his residence in the City of Bellingham, Whatcom County, Washington.

10.

That at all times herein mentioned, defendant, Caine Grimshaw Company, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Washington, and was, and still is, a resident and citizen of the State of Washington, having its place of business, residence and citizenship in the City of Bellingham, Whatcom County, Washington.

11.

That for a first cause of action against defendants, and all of them, plaintiff alleges as follows, to-wit: That on or about the 29th day of July, 1916, said defendants, Al Moran and W. T. Moran, co-partners as Moran Bros., entered into a contract with the City of Bellingham for the improvement of Maryland Street from Ellis Street to James Street in the City of Bellingham at the agreed contract price of $5,087.80,—said improvement to consist of clearing and paving the asphalt pavement as more particularly appears by a contract entered

into under Ordinance of the City of Bellingham No. 2773, creating Local Improvement District No. 519, a copy of which contract is hereto affixed, marked "Exhibit A", and made a part hereof.

12.

That to secure the performance of said contract entered into under the terms and conditions thereof, and to secure the payment due to all laborers, mechanics, sub-contractors, materialmen and persons who should supply such person or persons, or sub-contractors with materials, supplies and provisions for carrying on such work, said Moran Bros. and the plaintiff herein, American Surety Company of New York, executed a bond unto the State of Washington in the form provided by law in the penal sum of $5,087.80, which said bond was duly executed on the 27th day of July, 1916, and filed with the City of Bellingham, and that said contract and said bond were accepted by the City of Bellingham.

13.

That said contract has been fully completed and accepted by the City of Bellingham, but no payment has been made thereon either to said contractor or to the materialmen hereinafter named who have filed claims against said bond.

14.

That plaintiff is advised and so alleges the fact to be that the following claims have been presented against said bond, to-wit:

Morrison Mill Company for the sum of....$ 65.56

Craine Grimshaw Company for the sum of 1,268.19
Morse Hardware Company for the sum of 133.25
K. Sauset for the sum of.......... 2,125.36

15.

That plaintiff is informed, and verily believes, that said Al Moran and W. T. Moran, co-partners as Moran Bros., have assigned to the Bellingham National Bank all sums coming to them under said contract for certain advances made by the said Bellingham National Bank to said Moran Bros., and plaintiff avers that said assignment was given to said Bellingham National Bank as security for money to be advanced, the exact amount of said claim of said Bellingham National Bank, by reason of said assignment, plaintiff does not know, but is informed that said claim of the Bellingham National Bank against Moran Bros. amounts to $5,419.17, but whether all of said claim is by reason of advances upon said Maryland Street contract, plaintiff does not know.

16.

Plaintiff further avers that it is liable to the payment of all of said claims excepting the claim of the Bellingham National Bank under its said bond.

17.

Plaintiff further avers that defendant, City of Bellingham, is about to pay over to said Moran Bros., or to their assignee, Bellingham National Bank, the full amount of the contract price of said

bond, without requiring the application of any of said sums due said Moran Bros. to the payment of said claims filed against said Moran Bros. on said bond.

18.

Plaintiff further avers that said Al Moran and W. T. Moran, co-partners as Moran Bros., are insolvent, and are unable to respond to any claim of the plaintiff that it may have by reason of the payment of said claims to filed against said bond, and that if said sums due to said Moran Bros. are paid to said Moran Bros., or said Bellingham National Bank, their assignee, this plaintiff will have no protection on its liability on said claims to pay said claims or source from which it can seek reimbursement for payment thereof.

19.

Plaintiff further avers that in law and equity the sums unpaid to Moran Bros. on said contract ought of right to be applied in payment of materialmen, laborers and sub-contractors employed in prosecuting said work, and those furnishing materials and supplies to such persons, to the end that all claims should be paid that are justly chargeable to said work out of the contract price agreed to be paid therefor, to the extent that such sums so unpaid by the City of Bellingham on said contract, undistributed, are adequate therefor.

20.

Plaintiff further avers that in law and in equity it has a lien by virtue of becoming the surety

of the said Moran Bros. on their said contract with the City of Bellingham, upon all sums due them under said contract, to reimburse it for all sums it may be forced to pay on account of said claims so filed.

21.

Plaintiff further avers that it is not advised as to the validity of the claims of the other defendants than Moran Bros. as filed and asserted against said Moran Bros. and said bond, and that said defendants should be brought into this court to present their claims and offer proof in support thereof, and said City of Bellingham should be restrained from paying said money due on said contract, or any portion thereof, to said Moran Bros. or to said Bellingham National Bank, but should be permitted to pay said money into the registry of this court to be distributed in the payment, so far as the same is adequate therefor, of the laborers, materialmen, contractors, and sub-contractors who have performed labor or furnished materials upon said contract.

22.

Plaintiff further avers that this is a controversy between citizens and residents of different states, to-wit, between the American Surety Company of New York, a citizen and resident of the State of New York, and said defendants, all of whom are citizens and residents of the State of Washington, and that this action involves more than $3,000, exclusive of interest and costs.

FOR A SECOND CAUSE OF ACTION, this plaintiff avers:

1.

That on or about the 22nd day of September, 1916, the City of Bellingham entered into a contract with defendants, Al Moran and W. T. Moran, co-partners as Moran Bros., for the improvement of Iowa Street from James Street to Woburn Street, in the City of Bellingham, by clearing and grubbing, laying concrete walks and sewers, for the agreed compensation of $3,135.00, and that plaintiff, American Surety Company of New York, in order to secure the performance of said contract, and the payment of all laborers, mechanics, subcontractors and materialmen, and all persons who shall supply such person or persons or sub-contractors with materials, supplies and provisions for the carrying on of such work,—as surety for said Al Moran and W. T. Moran, executed a bond running to the City of Bellingham, on or about September 20, 1916, in the penal sum of $3,135.00, and said contract and bond were accepted by the City of Bellingham, and said bond is kept and held by the City of Bellingham as security for the performance of said contract, and is in full force, effect and virtue, and this plaintiff recognizes and always has recognized its liability thereunder, according to its true intent, tenor and meaning,—a copy of which said contract is hereto attached, marked "Exhibit B", and made a part hereof.

2.

That said defendants, Moran Bros., have substantially completed said contract for the improvement of Iowa Street, and same has been accepted by the City of Bellingham, but that no payments have been made to said Moran Bros. or to those furnishing material and labor on said contract, and the full amount of the contract price, to-wit, $3,135.00, remains in the hands of the City of Bellingham to be applied toward the payment of work done under said contract.

3.

That plaintiff is informed and verily believes that said defendants, Moran Bros., purported to sell, assign, transfer and set over unto the defendant, Bellingham National Bank, the warrants, vouchers or bonds to be issued in payment of the contract of said defendants, Moran Bros., to the City of Bellingham for advances theretofore or thereafter to be made by said Bellingham National Bank, and said assignment was given as security for money so advanced or to be advanced.

4.

Planitiff further avers that the aggregate amount of all the claims against said Moran Bros. for said work exceeds the amount of said contract price, and the following claims are asserted against said contract price, exclusive of the Bellingham National Bank (which claims an assignment from the City of Bellingham of all of the warrants to be issued by said city for said work): John Biekert,

Norman Transfer, Frank Middlestadt, John Kastner, Sam Sevier, Bellingham Concrete Works, W. M. Seeger, and Lynn & Williams.

5.

That of said claimants above mentioned, John Biekert, Norman Transfer Company, Frank Middlestadt, John Kastner, Sam Sevier, Bellingham Concrete Works, W. M. Seeger, and Lynn & Williams had filed no claims at the time of the commencement of this action but have since filed claims with the City Comptroller.

6.

Plaintiff further avers that said Iowa Street Improvement was abandoned by said Moran Bros. before the completion thereof and the City of Bellingham advertised for bids therefor, and said improvement was completed, and the American Surety Company of New York, plaintiff herein, advanced to said City of Bellingham the full sum necessary to pay for the completion of said work in cash, to-wit, the sum of $548.54.

7.

Plaintiff further avers that it is liable to the payment of all of the claims that have been filed with the City of Bellingham against said bond within thirty days after the acceptance thereof, and that said claims exceed the amount due upon said contract.

8.

Plaintiff further avers that it is informed and verily believes that said defendants, Moran Bros.,

have no means or property out of which a judgment could be satisfied or out of which they can or could indemnify this plaintiff for any sum it may be called upon to advance in the payment of said claims, and that if the sums due under said contract are paid to said Moran Bros., or to said Bellingham National Bank, this plaintiff will have no protection for its liability on said bond to pay said claims or source from which it can seek reimbursement for payment thereof.

9.

Plaintiff further avers that in law and in equity the sums unpaid to defendants, Moran Bros., on said contract, ought of right to be applied to the payment of materialmen, laborers and sub-contractors employed in prosecuting said work to the end that all claims should be paid that are justly chargeable to said work out of the contract price agreed to be paid therefor, to the extent that such sums undistributed of said contract price are adequate therefor, and plaintiff avers that its lien in and to the sums due and payable on said contract still unpaid is superior to any lien of the Bellingham National Bank in or to the same for moneys advanced by it, and that in law and in equity said Bellingham National Bank is not entitled to receive from the City of Bellingham the moneys due to said Moran Bros. on said contract under any assignment made by said Moran Bros. to it, but that said balance due upon said contract should be paid into court to be distributed by this Honorable Court as in law and

equity it may be determined to be meet and proper.

10.

Plaintiff further avers that this controversy in this second cause of action is between citizens and residents of different states, to-wit, between the American Surety Company of New York, a citizen and resident of the State of New York, and all of said defendants, who are citizens and residents of the State of Washington, and involves more than $3,000, exclusive of interest and costs.

11.

Plaintiff incorporates in its second cause of action herein each and every allegation set forth and contained in its first cause of action touching the residence and citizenship and corporate capacity of the plaintiff and defendants herein, and makes the same a part of this its second cause of action.

WHEREFORE, plaintiff prays that an order may be entered authorizing plaintiff to file this amended bill of complaint, and that this Honorable Court will be pleased to direct that subpoenas may be served upon said additional defendants above named, requiring them to present their claims in this action for determination, and that the prayer of the original bill of complaint herein may be granted, and that such other and further action may be had in the premises as in truth and in equity should obtain.

KELLOGG & THOMPSON,
HASTINGS & STEDMAN,
Solicitors for Plaintiff.

State of Washington, County of King.—ss.

S. H. Melrose, being first duly sworn, on his oath deposes and says: That he is the resident assistant secretary of the American Surety Company of New York, plaintiff above named; that he makes this verification for and on behalf of said plaintiff; that he has read the foregoing amended complaint, knows the contents thereof, and believes the same to be true.

S. H. MELROSE.

Subscribed and sworn to before me this 18th day of February, A. D. 1918.

ROSE E. MOHR,

(Seal) Notary Public in and for the State of Washington, residing at Seattle.

(Indorsed: Amended Bill of Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, April 2, 1918. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Bros.; THE CITY OF BELLINGHAM, a municipal corporation or-

ganized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE-GRIMSHAW COMPANY, a corporation,

Defendants.

JOHN BIEKERT, NORMAN TRANSFER, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, and THOMAS M. LYNN and M. J. WILLIAMS, copartners as LYNN & WILLIAMS.

Additional Defendants.

Findings of Fact and Conclusions of Law.

This cause came on to be heard at this term and was argued by counsel, plaintiff appearing by Messrs. Hastings & Stedman of Seattle, Washington, and Kellogg & Thompson of Bellingham, Washington; defendant Bellingham National Bank appearing by Messrs. Sather & Livesey, its attorneys; defendants Morse Hardware Company, E. K. Wood Lumber Company and Morrison Mill Company appearing by Messrs. Hadley & Abbott, their attorneys; defendant city of Bellingham appearing by the city attorney, Mr. Dan F. North of Bellingham,

Washington; defendants K. Sauset and Caine-Grimshaw Company appearing by Messrs. Kellogg & Thompson, their attorneys; Whidby Island Sand & Gravel Company likewise appearing, and the defendants Al Moran and W. T. Moran, co-partners doing business as Moran Brothers appearing not and their default having been regularly entered herein and the court being fully advised in the premises, and the cause having been submitted on stipulated facts and briefs having been submitted by the respective parties, the court now makes the following

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FINDINGS OF FACT:

I.

That defendants Al Moran and W. T. Moran were during the times mentioned in the pleadings herein co-partners engaged in the contracting business and were and are insolvent;

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and was and is a resident and citizen of the State of New York, and authorized to transact business in the State of Washington, and has paid its annual license fees last due to the State of Washington;

That all the defendants, including said bank, are citizens and residents of Bellingham, Washington.

II.

That on or about July 29th, 1916, defendants Moran entered into a contract with the City of Bel-

lingham for the improvement of Maryland Street at the agreed price of $5,087.80, said improvement to consist of clearing and paving said street as shown by the contract set forth as a part of plaintiff's complaint herein, which it is agreed is a true copy of the contract.

III.

That because of and as required by Sections 1159, 1160 and 1161, as amended, of Rem. & Ball. Codes of the State of Washington, plaintiff furnished to the City of Bellingham a bond complying with the requirements of said statute. Said bond was in the sum of $5,087.80 and was executed July 27th, 1916, and immediately thereafter filed with the City of Bellingham.

IV.

That said contract has been fully completed and accepted by the City of Bellingham, but no payment has been made thereon, either to the contractor or to the material men who have filed claims against said bond;

That there is due from the City of Bellingham at this time the sum of $5,721.00.

V.

That the following defendants have filed claims against said bond, said filings being in accordance with the requirement of Rem. & Ball. Code, and that the names of the claimants together with the amounts claimed are as follows:

Morrison Mill Company..................................$ 65.56
Caine-Grimshaw Company 1,268.19

Morse Hardware Company........................... 133.25
K. Sauset 2,125.36

That said claims are proper and lienable items and valid claims against the bond of plaintiff.

VI.

That from time to time subsequent to the execution and filing of said bond during the progress of the work of improving Maryland Street by Moran Brothers, defendant bank advanced to Moran Brothers to aid in the construction and improvement of said street $3,033.15. That to secure the repayment of said sum Moran Brothers assigned and transferred to said bank their right to all moneys, warrants and bonds to be issued to said Moran Brothers on account of the improvement of said Maryland Street and executed on the 11th day of September, 1916, an assignment of which the following is a copy:

Bellingham, Washington, Sept. 11, 1916.

Chas. A. McLennant,
City Comptroller:

Please deliver to the Bellingham National Bank all warrants and bonds to be issued on account of L. I. D. No. 519, Maryland Street, from Ellis to James.

Moran Bros., by Al Moran.

That on said date said assignment was filed with the city Comtproller of the City of Bellingham, Washington, and was accepted by him and has remained on file in his office since said time.

VII.

That of said $3,033.15 so advanced to said

Moran Brothers by said Bank for said improvement of Maryland Street all of said money except $150 was used by said Moran Brothers in paying for labor and material used in the improvement of said Maryland Street.

VIII.

That the defendant bank itself paid and caused to be paid various and sundry laborers who worked on said Maryland Street for Moran Brothers the sum of $290.15 and after said claim of Morse Hardware Company in the sum of $133.25 referred to in paragraph five herein, had been filed by the said Morse Hardware Company, said defendant bank paid said sum to said Morse Hardware Company.

IX.

That of said $3,033.15, $1,111.20 was paid to the Whidby Island Sand & Gravel Company for sand, gravel and cement furnished for the improvement of said street, and that of said sum of $3,033.15, $34.50 was paid to the Bellingham Bay Improvement Company for material furnished Moran Brothers for the improvement of said Maryland Street. That the remainder of said $3,033.15, exclusive of said sums of $290.15, $133.25, $1,111.20 and $34.50, was paid directly to Moran Brothers for the purpose of paying labor and material employed and used in the construction of said Maryland Street, and the same, except $150 has been so used by said Moran Brothers for the payment of said labor and material; that said labor

and material thus paid for, if they had not been paid were lienable items as against the money due from defendant city to Moran Brothers, and likewise lienable against the bond of plaintiff. That such claims, however, have not been filed with the City of Bellingham, or against said bond.

X.

That on or about September 22, 1916, defendants Moran entered into a contract with the City of Bellingham for the improvement of Iowa Street at the agreed price of $3,135.00, said improvement to consist of clearing and paving said street as shown by the contract set forth as a part of plaintiff's complaint herein, which it is agreed is a true copy of the contract.

XI.

That because of and as required by sections 1159, 1160 and 1161, as amended, of Rem. & Ball. Codes of the State of Washington, plaintiff furnished to the City of Bellingham a bond complying with the requirements of said statute. Said bond was in the sum of $3,135.00 and was executed September 20th, 1916, and immediately thereafter filed with the City of Bellingham.

XII.

That said contract has been completed and accepted by the City of Bellingham; that no payment has been made on said contract, either to the contractor or material men who have filed claims against said bond; that there is due from the City of Bellingham the sum of $2,778.05.

XIII.

That the following defendants have filed claims against said bond, said filings being in accordance with the requirements of Rem. & Ball. Code, and that the names of the claimants, together with the amounts claimed are as follows:

Claimant	Amount
Morse Hardware Company	$1,023.43
K. Sauset	90.00
Whidby Island Sand & Gravel Co.	622.40
E. K. Wood Lumber Company	118.16
Morrison Mill Company	84.16
John Kastner	1.50
John Bickert	18.60
Norman Transfer Company	2.50
Frank Middlestadt	32.40
Sam Sevier	2.80
Bellingham Concrete Works	124.99
Caine Grimshaw Company	47.28
W. M. Seeger	2.50
Thomas M. Lynn and M. J. Williams, copartners as Lynn & Williams	139.80

That said claims are proper and lienable items and valid claims against the bond of plaintiff.

XIV.

That the plaintiff advanced to the City of Bellingham in cash to pay for the completion of the Iowa Street improvement after its abandonment by Moran Brothers, $548.54.

XV.

That from time to time during the progress of the working of improving Iowa Street by Moran

Brothers defendant bank advanced to Moran Brothers to aid in the construction and improvement of said street $1,781.07; that to secure the repayment of said sum Moran Brothers assigned and transferred to said bank all moneys, warrants and bonds to be issued to said Moran Brothers on account of the improvement of said Iowa Street, and executed on the 20th day of October, 1916, an assignment, of which the following is a copy:

Bellingham, Washington.
Oct. 20th, 1916.

Chas. A. McLennan,
City Comptroller,
City of Bellingham, Washington:

Dear Sir:

Please deliver to the Bellingham National Bank all warrants or bonds to be issued on account of L. I. D. No. 527, Iowa Street from James to Woburn St.

MORAN BROS.,
By W. T. Moran.

That on said date said assignment was filed with the city comptroller of the City of Bellingham, Washington, and was accepted by him and has remained on file in his office since said time.

XVI.

That of said $1,781.07 so advanced to said Moran Brothers by said bank for said improvement of Iowa Street, all of said money except $100 was used by said Moran Brothers in paying for labor and material used in the improvement of said Iowa Street; that the defendant bank itself paid and caused to be paid to various and sundry labor-

ers who worked on said Iowa Street for Moran Brothers the sum of $1,024.80 and the further sum of $41.25 for the Bellingham Bay Improvement Company for labor on said street; that the remainder of said $1,781.07 was paid directly to Moran Brothers for the purpose of paying labor and material employed and used in the construction of said Iowa Street and the same except $100 has been so used by said Moran Brothers for the payment of said labor and material; that said labor and material thus paid for, if they had not been paid, were lienable items against the money due from defendant city to Moran Brothers, and likewise lienable against the bond of plaintiff; that such claims, however, have not been filed with the City of Bellingham or against said bond.

XVII.

That defendant Bellingham National Bank is entitled to receive $2,883.15 due it on the Maryland Street job, with interest from September 11th, 1916, at the rate of 7% per annum, the same being the rate of interest paid on the warrants due for said improvement.

XVIII.

That defendant Bellingham National Bank is entitled to receive $1,681.07 due it on the Iowa Street job, with interest from October 20th, 1916, at the rate of seven per cent the same being the rate of interest paid on the warrants due for said improvement.

Done in open court this 23rd day of May, 1918.

JEREMIAH NETERER, Judge.

From the foregoing Findings of Fact the court makes the following Conclusions of Law:

1—That a decree should be entered herein permitting a delivery of sufficient warrants issued by the defendant city of Bellingham for the improvement of Maryland Street in said city to the Bellingham National Bank in order that said bank may be paid by said warrants $2,883.15 in principal, with interest thereon from September 11, 1916, at seven per cent per annum, until paid, and decreeing that sufficient of the warrants issued by the defendant City of Bellingham for the improvement of Iowa Street in said city be delivered by said city to the Bellingham National Bank in order that said defendant bank may be paid by said warrants $1,681.07 in principal, with interest thereon from October 20th, 1916, at seven per cent per annum until paid.

2—That the remainder of said warrants be decreed to be delivered to the plaintiff herein and that the respective claimants named in paragraph V of the Findings herein have judgment against the plaintiff herein for the amount set opposite their respective names, with interest thereon from the 21st day of May, 1917, and that the respective claimants named in paragraph XIII of the Findings herein have judgment against the plaintiff herein for the amount set opposite their respective names, with interest thereon from the 4th day of February, 1918.

Done in open court this 23rd day of May, 1918.

JEREMIAH NETERER, Judge.

APPROVED:

....

....

Attorneys for Plaintiff.

O. K. AS TO FORM:

HADLEY AND ABBOTT,

Attorneys for Morse Hardware Company, E. K. Wood Lumber Company and Morrison Mill Company.

D. W. FEATHERKILE,

Attorney for City of Bellingham.

KELLOGG & THOMPSON,

Attorneys for K. Sauset and Caine-Grimshaw Company.

WHIDBY ISLAND SAND & GRAVEL CO.,

For Whidby Island Sand & Gravel Company.

SATHER & LIVESEY,

Attorneys for Bank.

(Indorsed: Findings of Fact and Conclusions of Law. Filed in the U. S. District Court, Western District of Washington, Northern Division. May 24, 1918. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN AND W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

JOHN BIEKERT, NORMAN TRANSFER, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, and THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams, *Additional Defendants.*

Plaintiff's Exceptions to Defendant Bellingham National Bank's Findings of Fact and Conclusions of Law.

Comes now the above named plaintiff, American Surety Company of New York, and excepts to the proposed findings of fact and conclusions of law herein, as follows, to-wit:

1.

Excepts to the first finding of fact, because the same does not find, as a fact admitted by the pleadings, that all the defendants are citizens and residents of Bellingham, Washington.

2.

Excepts to the 17th so-called finding of fact, which is as follows:

"That defendant Bellingham National Bank is entitled to receive $2,883.15 due it on the Maryland Street job, with interest from September 11th, 1916, at the rate of 7% per annum, the same being the rate of interest paid on the warrants due for said improvement,"—

upon the ground that said finding is not a finding of fact but is a conclusion of law and is not included in any fact stipulated in this cause, but is a deduction and conclusion therefrom, and if proper at all is a conclusion of law and not a finding of fact and further excepts because said fact or conclusion, so styled finding of fact No. XVII, is not proper or justifiable from the admitted or stipulated facts.

3.

Excepts to the 18th so-called finding of fact, which is as follows:

"That defendant Bellingham National Bank is entitled to receive $1,681.07 due it on the Iowa Street job, with interest from October 20th, 1916, at the rate of seven per cent the same being the rate of interst paid on the warrants due for said improvement"—
upon the ground that said finding is not a finding of fact but is a conclusion of law and is not included in any fact stipultaed in this cause, but is a deduction and conclusion therefrom, and if proper at all is a conclusion of law and not a finding of fact; and further excepts because said fact or conclusion, so styled finding of fact No. XVIII, is not proper or justifiable from the admitted or stipulated facts.

4.

Plaintiff further excepts to the first conclusion of law, upon the ground that said conclusion of law is an erroneous application of the law applicable to this cause to the facts stipulated; and upon the further ground that from the facts stipulated a conclusion should be drawn by the court and decree be entered directing the sale of all the warrants to satisfy all claims filed by creditors, laborers or materialmen against said contractors and the bond of the plaintiff, and the balance, if any, remaining to be delivered to said Belilngham National Bank; and further excepts to said conclusion because there is

no justification or authority authorizing the allowance to said bank of seven per cent.

5.

Plaintiff excepts to the second conclusion of law, upon the ground that said conclusion of law is an erroneous application of the law applicable to this cause to the facts stipulated.

6.

Plaintiff further excepts to the findings of fact and conclusions of law upon the ground that all the defendants are not named in the title thereof.

HASTINGS & STEDMAN,
Attorneys for Plaintiff.

The foregoing exceptions of the plaintiff to the findings of fact and conclusions of law were presented to the court before the signing of the findings of fact and conclusions of law, and are hereby allowed.

JEREMIAH NETERER, Judge.

(Indorsed: Plaintiff's Exceptions to Findings of Fact and Conclusions of Law. Filed in the U. S. District Court, Western District of Washington, Northern Division, May 24, 1918. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

JOHN BIEKERT, NORMAN TRANSFER, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, and THOMAS M. LYNN and M. J. WIILLIAMS, co-partners as Lynn & Williams,

Additional Defendants.

Conclusions of Law Suggested by Plaintiff.

This cause coming on for hearing, upon the stipulated facts filed herein and upon the pleadings, and the court, being duly advised in the premises, makes the following conclusions of law, to-wit:

1.

That a decree be entered herein directing a sale of sufficient of the warrants issued by the defendant, City of Bellingham, for the improvement of Maryland Street to pay the claims of Morrison Mill Company, $65.56; Caine-Grimshaw Company, $1,268.19; and K. Sauset, $2,125.36, with interest from May 21, 1917, at 6 % per annum, and that the balance of said warrants be delivered to the Bellingham National Bank.

2.

That sufficient of the warrants issued by the defendant, City of Bellingham, for the improvement of Iowa Street, be directed to be sold and the proceeds paid into the court to satisfy the claims of:

Morse Hardware Company	$1,023.43
K. Sauset	90.00
Whidby Island Sand & Gravel Co.	622.40
E. K. Wood Lumber Company	118.16
Morrison Mill Company	84.16
John Kastner	1.50
John Biekert	18.60
Norman Transfer Co.	2.50
Frank Middlestadt	32.40

Sam Sevier 2.80
Bellingham Concrete Works 124.99
Caine-Grimshaw Co. 47.28
W. M. Seeger 2.50
Thomas M. Lynn and M. J. Williams, co-
partners as Lynn & Williams............ 139.80

and the balance thereof be delivered to the said Bellingham National Bank.

....Judge.

The foregoing conclusions of law, presented by plaintiff, were presented to the court before the conclusions of law were signed, and were by the court refused, to which refusal the plaintiff excepts, and its exception is hereby allowed.

JEREMIAH NETERER, Judge.

(Indorsed: Plaintiff's Suggested Conclusions of Law. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 24, 1918. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation

organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE-GRIMSHAW COMPANY, a corporation, *Defendants.*

JOHN BIEKERT, NORMAN TRANSFER, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER and THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams,

Additional Defendants.

this suit, said stipulations being in writing and being on file herein and thereupon upon considera-

Judgment and Decree.

This cause came on to be heard at this term and was argued by counsel, plaintiff appearing by Messrs. Hastings & Stedman of Seattle, Washington, and Kellogg & Thompson of Bellingham, Washington; defendant Bellingham National Bank appearing by Messrs. Sather & Livesey, its attorneys; defendants Morse Hardware Company, E. K. Wood Lumber Company and Morrison Mill

Company appearing by Messrs. Hadley & Abbott, their attorneys; defendant City of Bellingham appearing by the City Attorney, Mr. Dan F. North of Bellingham, Washington; defendants K. Sauset and Caine-Grimshaw Company appearing by Messrs. Kellogg & Thompson, their attorneys; Whidby Island Sand & Gravel Company likewise appearing, and the defendants Al Moran and W. T. Moran, co-partners doing business as Moran Brothers, appearing not and their default having been regularly entered herein and the facts having heretofore been stipulated by all the parties to tion thereof it was ordered, adjudged and decreed as follows:

That sufficient of the warrants issued by the defendant City of Bellingham for the improvement of Maryland Street in said city be delivered by said city to the Bellingham National Bank in order that said bank may be paid by said warrants $2,883.15, with interest thereon at the rate of seven per cent per annum from September 11, 1916.

That sufficient of the warrants issued by the defendant City of Bellingham for the improvement of Iowa Street in said city be delivered by said city to the Bellingham National Bank in order that said defendant bank may be paid by said warrants $1,681.07, with interest thereon at the rate of 7% per annum from October 20th, 1916;

It is further Ordered, Adjudged and Decreed that the remaining warrants issued by the defendant City of Bellingham for the improvement of

Maryland Street and of Iowa Street in said city be delivered by said city to plaintiff.

It is further Ordered that the Morrison Mill Company, Caine-Grimshaw, Morse Hardware Company and K. Sauset have judgment and the same is hereby awarded against plaintiff in the respective sum of $65.56, $1,268.19, $133.25 and $2,-125.36, with interest thereon from the 21st day of May, 1917.

It is further Ordered, Adjudged and Decreed that Morse Hardware Company, K, Sauset, Whidby Island Sand & Gravel Company, E. K. Wood Lumber Company, Morrison Mill Company, John Kastner, John Bickert, Norman Transfer Company, Frank Middlestadt, Sam Sevier, Bellingham Concrete Works, Caine Grimshaw Company, W. M. Seeger, Thomas M. Lynn and M. J. Williams, co-partners as Lynn & Williams, have judgment and the same is hereby awarded against plaintiff in the respective sums of $1,023.43, $90.00, $622,-40, $18.16, $84.16, $1.50, $18.60, $2.50, $32.40, $2.80, $124.99, $47.28, $2.50, and $139.80, with interest from the 4th day of February, 1918.

It is further Ordered, Adjudged and Decreed that no costs shall be taxed against either party.

Done in open court this 23rd day of May, 1918.

JEREMIAH NETERER,
Judge of the above entitled court.

Approved:

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Attorneys for Plaintiff.

O. K. AS TO FORM:

HADLEY & ABBOTT,
Attorneys for Morse Hardware Company, E. K. Wood Lumber Company and Morrison Mill Company.

D. W. FEATHERKILE,
Attorney for City of Bellingham.

KELLOGG & THOMPSON,
Attorneys for K. Sauset and Caine-Grimshaw Company.

WHIDBY ISLAND SAND & GRAVEL CO. for Whidby Island Sand & Gravel Company.

SATHER & LIVESEY,
Attorneys for Bank.

(Indorsed: Judgment and Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 24, 1918. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Wash-

ington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants,*

JOHN BIEKERT, NORMAN TRANSFER, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, and THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams,

Additional Defendants.

Plaintiff's Exceptions to Decree.

Comes now the plaintiff and excepts to the decree prepared by the Bellingham National Bank herein upon the following grounds ,to-wit:

1.

Plaintiff excepts to said decree upon the ground and for the reason that all of the defendants herein are not named in the title to said degree.

2.

Excepts to the whole decree adjudging that the Bellingham National Bank have a preference in its claim against the Moran Brothers to the

claim of the materialmen and laborers and the Surety Company herein.

3.

Excepts to the provision in said decree directing that warrants be delivered to the defendant, City of Bellingham, to equal the claim of the Bellingham National Bank for advances on the Maryland Street improvement in the sum of $2,883.15, with interest at the rate of seven per cent; excepts to the allowance of any interest, and excepts to the refusal in said decree to direct that the interest accumulated on the warrants be also calculated in the amount of warrants to be turned over to said Bank.

4.

Excepts to the provision in said decree directing that warrants be delivered to the defendant, City of Bellingham, to equal the claim of the Bellingham National Bank for advances on the Iowa Street improvement in the sum of $1,681.07, with interest at the rate of seven per cent; excepts to the allowance of any interest, and excepts to the refusal in said decree to direct that the interest accumulated on the warrants be also calculated in the amount of warants to be turned over to said Bank.

5.

Excepts to the provision of said decree which provides that the Morrison Mill Company, Caine-Grimshaw Company, Morse Hardware Company and K. Sauset have judgment against the plaintiff for $65.56, $1,268.19, $133.25, and $2,125.36,

with interest, or at all, upon the ground that there is no provision in law or the facts in this cause justifying the same; and further upon the ground that the allowance of $133.25 to the Morse Hardware Company is a duplication of the allowance to the Belilngham National Bank, as shown by the ninth finding of fact herein suggested by the Bellingham National Bank.

6.

Excepts to the provisions in said decree allowing judgment in favor of the Morse Hardware Company, K. Sauset, Whidby Island Sand & Gravel Company, E. K. Wood Lumber Company, Morrison Mill Company, John Kastner, John Biekert, Norman Transfer Company, Frank Middlestadt, Sam Sevier, Bellingham Concrete Works, Caine-Grimshaw Company, W. M. Seeger, Thomas M. Lynn and M. J. Williams, co-partners as Lynn & Williams, for the sums therein mentioned, or in any sums whatever, upon the ground that same is not justified under the stipulation of facts or the law applicable to this cause.

HASTINGS & STEDMAN,
Attorneys for Plaintiff.

The foregoing exceptions were presented to the Court before the signing of the decree, and are hereby allowed.

JEREMIAH NETERER,
Judge.

(Indorsed: Plaintiffs Exception to Decree. Filed in the U. S. District Court, Western Dist. of

Washington, Northern Division, May 24, 1918. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants,*

JOHN BIEKERT, NORMAN TRANSFER, COMPANY, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCRETE WORKS, W. M.

SEEGER, and THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams, *Additional Defendants.*

Assignment of Errors.

And now, on this 3rd day of June, A. D. 1918, comes plaintiff herein, American Surety Company of New York, by Kellogg & Thompson and Hastings & Stedman, its solicitors, and says that the decree in said cause is erroneous and against the just rights of plaintiff, for the following reasons:

FIRST: Because the admissions of the pleadings and the agreed statement of facts show that the asignments of warrants and bonds from the Moran Brothers, contractors, to the Bellingham National Bank were subsequent in date to the right of subrogation of the plaintiff, American Surety Company of New York, surety upon the contractors' bond.

SECOND: Because by the admissions of the pleadings and the agreed statement of facts and the findings of the Court, it appears that the right of subrogation of the plaintiff, American Surety Company of New York to the rights of the claimants who furnished labor and material on said public works, and to the rights of the City of Bellingham against said fund in the hands of said City, is superior to the rights of said Moran Bros. or their assign, Bellingham National Bank.

THIRD: Because the agreed statement of facts shows that the Bellingham National Bank advanced no moneys until long after the execution of

the contract between the defendants, Moran Brothers, and the City of Bellingham, and long after the execution of the bond by the plaintiff to secure the performance of said contract.

FOURTH: Because from the agreed statement of facts, it appears that the Bellingham National Bank was a mere volunteer and not under any obligation to advance any moneys to said defendants, Moran Brothers, to enable them to perform said contract; that the rights of said bank accrued subsequent in time to the rights of plaintiff under its said bond.

FIFTH: Because it appears from the agreed statement of facts that the claimants who duly filed their claims against said Moran Brothers and against said bond are entitled to be paid out of the contract price due said Moran Brothers still in the hands of said City of Bellingham, and that their rights thereunder are prior to any claim of said Bellingham National Bank.

SIXTH: That said plaintiff is entitled, by virtue of its suretyship upon its bond to said Moran Brothers, to a decree requiring the City of Bellingham to pay said claims that are liens upon said fund in possession of said City of Bellingham, and to pay claims properly payable for material and labor and properly filed with said City of Bellingham before the claims of the Moran Brothers or their assigns are paid.

SEVENTH: Because it appears from the contract for the performance of said work that said

City of Bellingham had the power to withhold payment to said contractors, the defendants, Moran Brothers, of any sums whatsoever, until all claims for material and labor were paid.

EIGHTH: Because, from said statement of facts, and from the pleadings herein and admissions, it appears that the decree of the Honorable District Court should have directed that, out of the proceeds of the warants issued in payment of said improvements referred to in the bill of complaint and amended bill, all costs of this action and all claims duly filed with the City of Bellingham for labor and materials performed and furnished in the prosecution of said work, be paid, and the balance paid over to the said Moran Brothers, or their assign, the defendant, Bellingham National Bank.

WHEREFORE, said plaintiff prays that said decree be reversed, and that said Court be directed to enter a decree in accordance with the prayer of the bill of complaint.

KELLOGG & THOMPSON,
HASTINGS & STEDMAN,
Attorneys for Plaintiff.

(Service of the within Assignment of Errers by delivery of a copy to the undersigned is hereby acknowledged this 31st day of May, 1918. Hadley & Abbott, Attys. for Morse Hardware Co., Morrison Mill Co. and E. K. Wood Lbr. Co.; Sater & Livesey, Attys. for Bellingham Nat'l Bank and Whidby Island Sand & Gravel Co.; D. W. Feather-

kile, Atty. for City of Bellingham, K. Sauset, Caine-Grimshaw Co. Per P. C. Browne.)

(Indorsed: Assignment of Errors, filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 3, 1918, 4:40 p. m. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

JOHN BIEKERT, NORMAN TRANSFER COM-

PANY, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, and THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams,

Additional Defendants.

Petition for Appeal to United States Circuit Court of Appeals.

The above named plaintiff, American Surety Company of New York, conceiving itself aggrieved by the decree made and entered on the 23rd day of May, 1918, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed; that the temporary injunction heretofore rendered may be maintained in full force pending said appeal; that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

KELLOGG & THOMPSON,
HASTINGS & STEDMAN,
Attorneys for Plaintiff.

The foregoing claim of appeal is allowed.

JEREMIAH NETERER,
Judge.

Dated 3rd day of June, 1918.

(Service of the within Petition for Appeal by delivery of a copy to the undersigned is hereby acknowledged this 31st day of May, 1918. Hadley & Abbott, Attorneys for Morse Hardware Co., Morrison Mill Co. and E. K. Wood Lbr. Co.; Sather & Livesey, Attys. for Bellingham Nat'l Bank and Whidby Island Sand & Gravel Co.; D. W. Featherkile, Atty. for City of Bellingham, K. Sauset, Caine-Grimshaw Co. Per P. C. Browne.)

(Indorsed: Petition for Appeal to United States Circuit Court of Appeals, filed in the U. S. District Court of Appeals, Western Dist. of Washington, Northern Division, June 3, 1918, 4:45 p. m. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the

United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

JOHN BIEKERT, NORMAN TRANSFER COMPANY, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, and THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams,

Additional Defendants.

Order.

There having been presented to the Court the petition and claim of appeal of the American Surety Company of New York, plaintiff herein, from the judgment and decree rendered in this cause on the 23rd day of May, 1918, and said American Surety Company of New York having petitioned that the temporary injunction entered herein be maintained in force pending said appeal:

It is here and now ordered and adjudged that said claim of appeal be, and it hereby is, allowed.

It is further hereby ordered and adjudged that the temporary injunction heretofore entered in this cause by this Court be maintained in full force and effect pending said appeal.

It is hereby further ordered that the bond for

costs and supersedeas be, and the same is, hereby fixed in the sum of $10,000.00.

Done in open court this June 3, 1918.

JEREMIAH NETERER,

Judge.

(Indorsed: Order filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 3, 1918, 4:45 p. m. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET;

CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

JOHN BIEKERT, NORMAN TRANSFER COMPANY, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCREE WORKS, W. M. SEEGER, and THOMAS M. LYNN and M. J. WILLIAMS, co-partners as LYNN & WILLIAMS,

Additional Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, American Surety Company of New York, as principal, and National Surety Company, as surety, are held and firmly bound unto the Bellingham National Bank, The City of Bellingham, Morse Hardware Company, Whidby Island Sand & Gravel Company, E K. Wood Lumber Company, Morrison Mill Company, K. Sauset, Caine Grimshaw Company, John Biekert, Norman Transfer Company, Frank Middlestadt, John Kastner, Sam Sevier, Bellingham Concrete Works, W. M. Seeger, and Thomas M. Lynn and M. J. Williams, co-partners as Lynn & Williams, in the full and just sum of $10,000.00, to be paid to the said Bellingham National Bank, The City of Bellingham, Morse Hardware Company, Whidby Island Sand & Gravel Company, K. Sauset, Caine Grimshaw Company, John Biekert, Norman Transfer Company, E. K. Wood Lumber Company, Morrison Mill Company, Frank Middlestadt, John Kastner, Sam Sevier, Bellingham Concrete Works, W. M. Seeger,

and Thomas M. Lynn and M. J. Williams, co-partners as Lynn & Williams, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of June, in the year of our Lord one thousand, nine hundred and eighteen.

WHEREAS, lately at a District Court of the United States for the Western District of Washington, Northern Division, in a suit depending in said court between the American Surety Company of New York, as plaintiff, and Al Moran and W. T. Moran, co-partners doing business as Moran Brothers, The City of Bellingham, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington, The Bellingham National Bank, a corporation organized under the laws of the United States of America; Morse Hardware Company, a corporation; Whidby Island Sand & Gravel Company, a corporation; E. K. Wood Lumber Company, a corporation; Morrison Mill Company, a corporation; K. Sauset; Caine Grimshaw Company, a corporation; John Biekert, Norman Transfer Company, Frank Middlestadt, John Kastner, Sam Sevier, Bellingham Concrete Works, W. M. Seeger, and Thomas M. Lynn and M. J. Williams, co-partners as Lynn & Williams, as defendants, a decree was rendered against said American Surety Company of New

York, and said American Surety Company of New York having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Bellingham National Bank, the City of Bellingham, Morse Hardware Company, Whidby Island Sand & Gravel Company, E. K. Wood Lumber Company, Morrison Mill Company, K. Sauset, Caine Grimhsaw Company, John Biekert, Norman Transfer Company, Frank Middlestadt, John Kastner, Sam Sevier, Bellingham Concrete Works, W. M. Seeger, and Thomas M. Lynn and M. J. Williams, co-partners as Lynn & Williams, citing and admonishing them to appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, held at the City of San Francisco in said Circuit on the 2nd day of July next.

Now, the condition of the above obligation is such that if the said American Surety Company of New York shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Signed, sealed and delivered in presence of:

AMERICAN SURETY COMPANY OF NEW YORK,

By A. E. Krull,

Its Resident Vice-President.

AMERICAN SURETY COMPANY OF NEW YORK,

By Forest la Barre,

Its Resident Assistant Secretary.

NATIONAL SURETY COMPANY,

(Seal) By George W. Allen,

Resident Vice-President.

Attest: Rollin Whyte,

Resident Assistant Secretary.

Approved by:

JEREMIAH NETERER,

United States District Judge.

(Indorsed: Bond on Appeal, filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 3, 1918, 4:45 p. m. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, *Plaintiff, Appellant.*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a cor-

poration organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation; JOHN BIEKERT; NORMAN TRANSFER COMPANY; FRANK MIDDLESTADT; JOHN KASTNER; SAM SEVIER; BELINGHAM CONCRETE WORKS; W. M. SEEGER, and THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams,

Defendants, Respondents.

Stipulation.

It is hereby stipulated and agreed between plaintiff and appellant and defendants and respondents that the findings of fact and the exceptions thereto, the decree and the exceptions thereto, the proposed findings of fact and rejections thereof and exceptions thereto, and the proposed decree and rejections thereof and exceptions thereto, filed by the Court herein, contain all material facts essential to the determination of this cause upon appeal.

KELLOGG & THOMPSON,
HASTINGS & STEDMAN,

Attorneys for Plaintiff and Appellant.

SATHER & LIVESEY,

Attorneys for Defendant and Respondent, Bellingham National Bank.

HADLEY & ABBOTT,

Attorneys for Defendants and Respondents, Morse Hardware Company, E. K. Wood Lumber Company, and Morrison Mill Company.

D. W. FEATHERKILE,

Attorneys for Defendant and Respondent, City of Bellingham.

K. SAUSET.

CAINE GRIMSHAW CO., Per P. C. Browne,

For Defendants and Respondents, K. Sauset and Caine-Grimshaw Company.

WHIDBY ISLAND SAND & GRAVEL CO.,

Defendant and Respondent, Whidby Island Sand & GRAVEL COMPANY.

(Indorsed: Stipulation, filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 13, 1918. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

In the District Court of the United States for the Western District of Washington, Northern Division.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of

the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation, organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation,
Defendants.

Hastings & Stedman and Kellogg & Thompson, Attorneys for Plaintiff.

Sather & Livesey, Attorneys for Defendant Bellingham National Bank.

Hadley & Abbott, Attorneys for Defendants Morse Hardware Co., E. K. Wood Lumber Co., and Morrison Mill Co.

Kellogg & Thompson, Attorneys for Defendants K. Sauset and Caine-Grimshaw Co.

NETERER, District Judge:

The plaintiff seeks to enjoin the defendant City of Bellingham from delivering to the defendant Moran Brothers or to the defendant Bellingham National Bank certain warrants due on account of improvements in certain streets in the City of Bellingham, alleging that it is a foreign corporation, and that the contract for the improvement of the street was entered into with the defendant city, and that the plaintiff, pursuant to the laws of Washington, executed a bond to the City of Bellingham

conditioned that the said contractors would pay for all labor, material, and supplies used in the construction of said streets, and that the defendant contractors defaulted in said contracts and in the payment of such claims; and that the contractors assigned to the Bellingham National Bank all warrants due to the City of Bellingham for such improvements, and that the right of lien of plaintiff is superior to that of said bank by reason of the relation sustained to said improvement contract, and that plaintiff is subrogated to the rights of the contractors, and its lien as surety is surepior to that of the defendant bank.

The defendant bank filed answer denying the right of the plaintiff to relief as against it, alleging that the said assignment was made for value and accepted by the defendant city, and that the bank pursuant to said assignment paid various claims for labor and material and supplies actually used in the construction of said streets, and that the equity of the defendant bank is superior to that of plaintiff.

A motion to strike the answer of the defendant was denied by this court by memorandum decision filed October 10, 1917, in which this court said "that it must be apparent that the plaintiff cannot be subrogated to claims paid by the bank, and that the issue cannot be equitably determined by the motion to strike." No opinion was expressed as to the equitable rights of the parties or the application of the authorities presented to the issue.

The cause is now submitted to the court upon its merits, and it is stipulated by the parties that upon the Maryland Street contract there is due from the defendant city for such improvement the sum of $5293.09; that claims have been filed against the bond executed by plaintiff in accordance with the provisions of law, as follows: Morrison Mill Co., $65.56; Caine-Grimshaw Co., $1268.19; Morse Hardware Co., $133.25; K. Sauset, $2125.36; all of said items being valid claims against said bond.

It is further stipulated that subsequent to the execution and filing of said bond during the progress of said improvement, the defendant bank advanced for labor, supplies and material to the Whidby Island Sand & Gravel Co. for sand, gravel, and cement used in said improvement, the sum of $1111.20; that it paid to various and sundry laborers who worked on said street for said contractors the sum of $290.15, and paid to the Morse Hardware Co. $133.25 after said claim had been filed; that it paid to the Bellingham Improvement Co. for material furnished for said improvement to said contractors $34.50; that the said bank "paid directly to Moran Brothers for the purpose of paying labor and material employed and used in the construction of said Maryland Street" a further sum, making in the aggregate, with the specific payments made by the bank as herein stated, a total sum of $3033.15, less $150; that said labor and material thus paid for, if not paid, were lienable items

against the money due from the defendant city to Moran Brothers, and likewise lienable items against the bond of plaintiff; "that such claims, however, have not been filed with the City of Bellingham or against said bond."

It is also stipulated that the City of Bellingham entered into an agreement with the defendant contractors for the improvement of Iowa Street for the sum of $3135.00; that the plaintiff executed a bond as required by law, and after the execution and filing of said bond the said improvement was completed, and that claims were filed against said bond for material, etc., as follows: Morse Hardware Co., $1022.43; Whidby Island Sand & Gravel Co., $630.00; E. K. Wood Lumber Co., $174.46; Morrison Mill Co., $75.16; that all of said claims are lienable items and valid against the plaintiff's bond; that the defendant bank, after filing of such bond and during the progress of the work, advanced to said contractors $1781.07, and secured an assignment of all the warrants issued on account of said improvement, which was executed by the defendant city; that "all of said moneys, except $100, was used by said Moran Brothers in paying for labor and material used in the improvement of said Iowa Street; that the defendant bank itself paid and caused to be paid to various and sundry laborers who worked on said Iowa Street for Moran Brothers the sum of $1024.80, and the further sum of $41.25 for the Bellingham Bay Improvement Company for labor on said street; * * * that said

labor and improvement thus paid for, if it had not been paid, was lienable and a claim against the money due from the defendant city to said contractors, and likewise a charge against the bond of the plaintiff; that said claims, however, have not been filed with the City of Bellingham or against said bond."

I think the statement of the facts is conclusive that the equities of the case are with the defendant bank. There is no inhibition in the contract against the assignment of any of the warrants, nor is there any stipulation against the issuance of any of said warrants during the progress of the work. The city could lawfully issue to the contractors the entire sum as the work progressed. In this the rights of the parties are distinguished from the issue in *Prairie City Bank vs. United States*, 164 U. S. 227, relied upon by plaintiff. The bank in making the advancements applied the sums advanced to the payment of the claims guaranteed by the plaintiff, and by the application of those funds reduced the liability of the plaintiff under the stipulations of its bond. The plaintiff was not injured by any act of the defendant bank except as to the sum of $100 and $150 advanced on the respective contracts, which was not thus applied.

The facts in this case are likewise distinguished from the facts in the *Title Guaranty & Surety Co., v. Dutcher, et al.*, 203 Fed. 167. In that case "no account was kept of the particular work upon which disbursements were made, and it is not

shown how much, if any, of the money borrowed, or other money of his was paid upon the contract in question."

Nor are the facts in this case controlled by *First National Bank v. City Trust Safe Deposit & Surety Co.*, 114 Fed. 529. In that case no equities obtained in favor of the bank, and the court permitted subrogation, because denying it would have worked injustice to the rights of the City Trust Safe Deposit & Surety Co., no equities being in favor of the bank; while in this case the equities are all in favor of the defendant bank, and no wrong or negligence or inequitable or illegal taking of any character can be attributed to the bank.

A decree may be taken permitting delivery of all warrants by the defendant city to the defendant bank to the amount of the moneys advanced by the defendant bank less $100 on the Iowa Street improvement, and $150 on the Maryland Street improvement. No costs to be taxed against either party.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff.*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY

OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America, et al.,

Defendants.

Notice and Praecipe.

To Frank L. Crosby, Esq., Clerk of Above Entitled Court:

You are requested to take a transcript of the record to be filed with the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. Bill of complaint.
2. Order directing service by publication.
3. Proof of service by publication.
4. Order of default of Moran Brothers.
5. All answers.
6. Amended bill of complaint.
7. Findings of fact and conclusions of law.
8. Exceptions to findings of fact and conclusions of law, and order allowing the same.
9. Proposed conclusions of law and order denying same.
10. Decree, and exceptions to same, and order allowing the same.
11. Assignment of errors.
12. Petition for appeal and order thereon.

13. Order allowing appeal and fixing supersedeas.
14. Supersedeas bond.
15. Citation.
16. Stipulation as to record necessary to be printed.
17. Your certificate.
18. Exhibit "A."
19. Opinion of Court.

HASTINGS & STEDMAN,
KELLOGG & THOMPSON,
Attorneys for Plaintiff.

(Service of the within Notice and Praecipe by delivery of a copy to the undersigned is hereby acknowledged this 13th day of June, 1918. Sather & Livesey, Attorneys for Bellingham Nat'l Bank, Whidby Island Sand & Gravel Co.; D. W. Featherkile, City Att'y Bellingham; Hadley & Abbott, Attys. for E. K. Wood Lumber Co., Morrison Mill Co. and Morse Hardware Co.; Caine Grimshaw Co., per P. C. Browne, K. Sauset.)

(Indorsed: Notice to clerk for Transcript, filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 15, 1918. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

United States District Court, Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELLINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY, a corporation, *Defendants.*

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America, Western District of Washington.—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this printed record numbered from 1 to 161, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and fore-

going entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 307 folios at 15c...............$	46.05
Certificate of Clerk to transcript of record, 4 folios at 15c...............	.60
Seal to said Certificate...............	.20
Statement of cost of printing said transcript of record, collected and paid....	207.50
	$254.35

I hereby certify that the above cost for preparing and certifying record amounting to $254.35 has been paid to me by counsel for appellant.

I further certify that I hereto attach and

herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 17th day of July, 1918.

F. M. HARSHBERGER,
(Seal) Clerk United States District Court.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9-E.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation, *Plaintiff,*

vs.

AL MORAN and W. T. MORAN, co-partners doing business as Moran Brothers; THE CITY OF BELLINGHAM, a municipal corporation organized and existing under and by virtue of the laws of the State of Washington; THE BELINGHAM NATIONAL BANK, a corporation organized under the laws of the United States of America; MORSE HARDWARE COMPANY, a corporation; WHIDBY ISLAND SAND & GRAVEL COMPANY, a corporation; E. K. WOOD LUMBER COMPANY, a corporation; MORRISON MILL COMPANY, a corporation; K. SAUSET; CAINE GRIMSHAW COMPANY a corporation, *Defendants.*

JOHN BIEKERT, NORMAN TRANSFER COMPANY, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEVIER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, and THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams,

Additional Defendants.

Citation.

The United States of America, to Bellingham National Bank, The City of Bellingham, Morse Hardware Company, Whidby Island Sand & Gravel Company, E. K. Wood Lumber Company, Morrison Mill Company, K. Sauset, Caine Grimshaw Company, John Biekert, Norman Transfer Company, Frank Middlestadt, John Kastner, Sam Sevier, Bellingham Concrete Works, W. M. Seeger, and Thomas M. Lynn and M. J. Williams, co-partners as Lynn & Williams:

WHEREAS, the American Surety Company of New York has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree lately rendered in the district Court of the United States for the Western District of Washington, Northern Division, made in favor of said Bellingham National Bank, The City of Bellingham, Morse Hardware Company, Whidby Island Sand & Gravel Company, E K. Wood Lumber Company, Morrison Mill Company, K. Sauset, Caine Grimshaw Company, John Biekert, Norman Transfer Company, Frank Middle-

stadt, John Kastner, Sam Sevier, Bellingham Concrete Works, W. M. Seeger, and Thomas M. Lynn and M. J. Williams, co-partners as Lynn & Williams, and has filed the security required by law;

You are, therefore, hereby cited to appear before the said United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, on the 2nd day of July next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of Seattle, in the Ninth Circuit, this 3rd day of June, in the year of our Lord one thousand nine hundred and eighteen.

JEREMIAH NETERER,

Judge of the District Court of the United States for the Western District of Washington.

Service of the within Citation by delivery of a copy to the undersigned is hereby acknowledged this 24th day of June, 1918.

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(Indorsed: Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 3, 1918, 4:45 p. m. Frank L. Crosby, Clerk, by Edith A. Handley, Deputy.)

No. 3183

In the United States Circuit Court of Appeals

For the Ninth Judicial Circuit

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

BELLINGHAM NATIONAL BANK, THE CITY OF BELLINGHAM, MORSE HARDWARE COMPANY, WHIDBY ISLAND SAND & GRAVEL COMPANY, MORRISON MILL COMPANY, K. SAUSET, CAINE GRIMSHAW COMPANY, JOHN BIEKERT, NORMAN TRANSFER COMPANY, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEIVER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, Presiding

Brief of the American Surety Company of New York, Plaintiff and Appellant

HASTINGS & STEDMAN,
KELLOGG & THOMPSON,
Solicitors for Appellant

LIVINGSTON B. STEDMAN, Counsel
Office and Post Office Address, 64 Haller Bldg., Seattle, Washington

THE ARGUS PRESS SEATTLE

FILED AUG 10 1918

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STATEMENT OF THE CASE.

The City of Bellingham, Washington, made two contracts with the defendants, Moran Bros., for street improvements; one to improve Maryland Street, dated July 29, 1916, at a cost of Five Thou-

sand Eighty-seven Dollars and Eighty Cents ($5,087.80) (Finding of Fact II, Record 109) and the other to improve Iowa Street, dated September 22, 1916, at a cost of Three Thousand One Hundred and Thirty-five ($3,135.00) Dollars (Finding of Fact X, Record 113).

To secure the faithful performance of these contracts and the payment for labor and material entering into the work, Moran Bros. were compelled by the City of Bellingham to give bonds for the full amount of each contract; and the plaintiff and appellant, the American Surety Company of New York, became surety on both of said bonds. The Maryland Street bond was dated July 27, 1916, and the Iowa Street bond was dated September 20, 1916 (Finding III, Record 110; Finding XI, Record 113).

Though the work under Maryland Street contract was completed the city yet holds the full amount of the contract price and the price of the extras, amounting to Five Thousand Seven Hundred and Twenty-one ($5,721.00) Dollars (Finding IV, Record 110), and the city has paid nothing on the Iowa Street contract but retained as admitted due thereon, Two Thousand Seven Hundred and Seventy-eight Dollars and Five Cents ($2,778.05) (Finding XII, page 113), and the American Surety Company has advanced for the completion of the Iowa Street contract Five Hundred and Forty-eight Dollars and Fifty-four Cents ($548.54) (Finding XIV, Record 114).

Claims have been filed for material and labor against the Maryland Street bond aggregating Three Thousand Five Hundred and Ninety-two Dollars and Thirty-six cents ($3,592.36) (Finding V, Record 110) and the Bellingham National Bank made advances to the Moran Bros. for the Maryland Street work—all of which excepting One Hundred and Fifty ($150.00) Dollars was used in prosecuting said work—amounting to Three Thousand Thirty-three Dollars and Fifteen Cents ($3,033.15) (Finding VI, Record 111).

Like claims have been filed against the Iowa Street bond for Two Thousand Three Hundred and Ten Dollars and Fifty-two Cents ($2,310.52) (Finding XIII, Record 114), and the bank has advanced to the Moran Bros. to prosecute the Iowa Street contract, all of which was so used excepting One Hundred ($100.00) Dollars, the sum of One Thousand Seven Hundred and Eighty-one Dollars and Seven Cents ($1,781.07) (Finding XV, Record 114).

The bank took assignments from the Moran Bros. or orders on the city comptroller to secure these advances; on the Maryland Street contract September 11, 1916 (the contract was made July 29th and the plaintiff's bond executed July 27, 1916) (Finding VI, Record 111), and on the Iowa Street contract on October 20, 1916 (contract made September 22nd, plaintiff's bond executed September 20th) (Finding XV, Record 115).

The contracts for the performance of this

work between the Moran Bros. and the City authorized the City of Bellingham to "withhold any and all payments under this contract until satisfied that such wages, assistance and materials have been fully paid for." (Record, page 27, bottom and top of page 28.)

The bank claims to have paid the Morse Hardware Company One Hundred and Thirty-three Dollars and Twenty-five Cents ($133.25) (Finding VIII, Record 112), yet the court, over the plaintiff's and appellant's objections (Record 132) allowed the claim to Morse Hardware Company (Record 128).

The bank did not file any claims with the City of Bellingham (Finding IX, Record 113, and Finding XVI, Record 116).

The plaintiff and appellant contests none of these claims for labor and material, excepting the Morse Hardware Company's claim on Maryland Street for One Hundred and Thirty-three Dollars and Twenty-five Cents ($133.25). The only substantial question presented to Your Honors is, whether the bank is entitled to have its claims paid in full by virtue of its assignments from the Moran Bros. or whether the American Surety Company has the prior equity to have the funds or warrants now in the hands of the City of Bellingham, devoted to the payment of the claims for labor and materials that have been duly filed with the city comptroller before any payment is made to the Bellingham National Bank on its assignments from Moran Bros.

SPECIFICATION OF ERRORS.

FIRST: The decree is erroneous because from the findings the assignments to the Bellingham National Bank of the warrants and the improvement bonds from the contractors were subsequent in date to the execution of the bond of the plaintiff and appellant, American Surety Company. The American Surety Company's equity in the funds in the hands of the City was superior in point of time.

SECOND: The decree is erroneous because, under the law and the findings of the court, the right of subrogation of the American Surety Company of New York to the rights of the claimants who furnished labor and material on the public works, and also to the rights of the City of Bellingham against the funds in the hands of the City, is superior to the right of the contractors, Moran Bros., or their assignee, Bellingham National Bank.

THIRD: The decree is erroneous because, from the findings, it appears that all moneys advanced by the Bellingham National Bank were advanced long after the execution of the bonds.

FOURTH: Said decree is erroneous in favor of the Bellingham National Bank as against the American Surety Company of New York, because the Bellingham National Bank was a mere volunteer and under no obligation to advance any moneys to the Moran Bros.

FIFTH: The decree is erroneous because, under the contract for the performance of said

work, the claimants, who filed their claims against the contractors and said bond, are entitled to have their payments made out of the contract price, and such right is prior to any claim of the Bellingham National Bank.

SIXTH: The decree is erroneous because the plaintiff and appellant, American Surety Company of New York, under its contract of suretyship, is entitled to have the claims that are liens upon the bond and upon the fund in possession of the City of Bellingham paid before the assignments of the contractors to the Bank are recognized.

SEVENTH: The decree is erroneous in that it did not direct that the funds in the hands of the City should be devoted, first, to the payment of all claims filed against said contractors and said bonds, and the balance, if any, paid over to the Bellingham National Bank in the place of giving the preference, as given in said decree, to the said Bellingham National Bank.

EIGHTH: The decree is erroneous because it appears from the findings that the Morse Hardware Company had been already paid, by the Bellingham National Bank, its claim of $133.25 filed against the Maryland Street improvement, notwithstanding which the Court ordered it again to be paid.

ARGUMENT.

With the exception of the question of the claim of the Morse Hardware Company, on the Maryland Street contract for $133.25, which the Bell-

ingham National Bank had paid, and concerning which there is no argument necessary, the sole question to present to Your Honors is whether the surety upon the contractors' bond for public work —executed at or before the time the contract was let and a part of the original contract, which surety is bound to pay the claims duly filed with the city officials for labor and materials—is entitled to have the funds in the hands of the City devoted to the payment of those claims in preference to the claims of the Bellingham National Bank, assignee of the contractors, who, if they had made no assignment, would have been entitled to no payment before the labor and materials were paid for.

SURETY IS ENTITLED TO SUBROGATION TO RIGHTS OF THE CITY AND LABOR OR MATERIAL CLAIMANTS.

The question is not a new question in this Circuit. The leading Federal case is that of *Prairie State National Bank vs. United States*, 164 U. S. 227, 41 L. Ed. 412. In this case, the Court, speaking through the then Mr. Justice White (now Chief Justice) says:

> "The Prairie Bank asserts an equitable lien in its favor, which it claims originated in February, 1890, and is therefore paramount to Hitchcock's lien, which it is asserted arose only at the date of his advances. The claim of Hitchcock, on the other hand, is that his equity arose at the time he entered into the contract

of suretyship, and therefore his right is prior in date and paramount to that of the bank. * * *

"That Hitchcock, as surety on the original contract, was entitled to assert the equitable doctrine of subrogation is elementary. That doctrine is derived from the civil law, and its requirements are, as stated in *Aetna L. Ins. Co. v. Middleport*, 124 U. S. 534 (31:537): '(1) That the persons seeking its benefits must have paid a debt due to a third party before he can be substituted to that party's rights; and, (2), that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgages, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another.' See authorities reviewed at pp. 548 (542) *et seq.*

"As said by Chancellor Johnson in *Gadsen v. Brown, Speers*, Eq. 38, 41 (quoted and referred to approvingly in the opinion in *Aetna L. Ins. Co. v. Middleport*, just referred to), 'the doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in any condition in which

they were at liberty to elect whether they would or would not be bound and, as far as I have been able to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty.

"Under the principles thus governing subrogation, it is clear whilst Hitchcock was entitled to subrogation the bank was not. The former in making his payments discharged an obligation due by Sundberg for the performance of which he, Hitchcock, was bound under the obligation of his suretyship. The bank, on the contrary, was a mere volunteer, who lent money to Sundberg on the faith of a presumed agreement and of supposed rights acquired thereunder. The sole question, therefore, is whether the equitable lien, which the bank claims it has, without reference to the question of its subrogation, is paramount to the right of subrogation which unquestionably exists in favor of Hitchcock. In other words, the rights of the parties depend upon whether Hitchcock's subrogation must be considered as

arising from and relating back to the date of the original contract, or as taking its origin solely from the date of the advance by him.

"A great deal of confusion has arisen in the case by treating Hitchcock as subrogated merely 'in the rights of Sundberg & Co.' in the fund, which, in effect, was saying that he was subrogated to no rights whatever. Hitchcock's right of subrogation, when it became capable of enforcement, was a right to resort to the securities and remedies which the creditor, the United States, was capable of asserting against its debtor, Sundberg & Company, had the security not satisfied the obligation of the contractors, and one of such remedies was the right based upon the original contract to appropriate the 10 per cent retained in its hands. * * *

"Applying the principles which are so clearly settled by the foregoing authorities to the case at bar, it is manifest that if the transaction in February, 1890, by which the Prairie Bank acquired its alleged lien on the fund possessed the effect contended for by the bank, it would necessarily operate to alter and impair rights acquired by the surety under the original contract.

"Sundberg & Company could not transfer to the bank any greater rights in the fund than they themselves possessed. Their rights were subordinate to those of the United States

and the sureties. Depending, therefore, solely upon rights claimed to have been derived in February, 1890, by express contract with Sundberg & Company, it necessarily results that the equity, if any, acquired by the Prairie Bank in the 10 per cent fund then in existence and thereafter to arise was subordinate to the equity which had, in May, 1888, arisen in favor of the surety Hitchcock. It follows that the court of claims did not err in holding that Hitchcock was entitled to the fund and its judgment is therefore affirmed."

We have quoted thus largely from the case of *Prairie State National Bank vs. United States* because that case is the leading authority upon the question involved in this action.

It is true that that case is distinguishable from the case at bar because in the case of *Prairie State National Bank vs. United States*, a Federal contract was involved which expressly forbid the assignment of any sums due thereon, but the words of the court in its opinion, with reference to the rights of subrogation, have been quoted with approval and followed in other cases, to which we will call Your Honors' attention.

A point almost identical with the case at bar was raised in the case of *Henningsen v. United States Fidelity & Guaranty Co. of Baltimore, Md.*, 143 Fed. 810. Henningsen, the contractor, completed the work but failed to pay for all the materials and labor. Whereupon the surety company

commenced a suit, as plaintiff has in this case, against the contractor and each of the persons to whom the contractor was indebted, and the Honorable Circuit Court of the United States for the Northern Division of the Western District of Washington entered an order directing the payment of the penalty of the bond to the creditors pro rata and the release of the surety. Thereupon, an action was brought to prevent the quartermaster from dispensing to Henningsen, or to the officers of the bank—who advanced Henningsen money to carry on the contract—the unpaid portion of the contract price, and the Court held that the equity of the surety company was superior to that of the bank therein. Judge Ross, speaking for the Circuit Court of Appeals, says, at page 813:

> "Whatever equity, if any, the bank had to the fund in question, arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles, entitled to assert the equitable doctrine of subrogation; but it is equally clear that the bank was not, for it was a mere volunteer, and under no legal obligation to loan its money. *Prairie State Bank v. United States, supra; Insurance Company v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; *Sheldon on Subrogation*, Sec. 240.
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> "Where, as in the *Prairie State Bank* and the *Rundle* cases, *supra*, the surety is compelled to make good the default of his principal

as respects the government, the surety is, as was distinctly held in those cases, entitled to be subrogated to the rights of the government. Upon precisely the same principle the surety is entitled to be subrogated to the rights of the laborers and materialmen, where, as in the present case, it is compelled by reason of the obligations of the bond to pay them for labor and material because of the default of its principal. That right of subrogation relates back, as was held by the Supreme Court in *Prairie State Bank v. United States, supra,* to the time the contract of suretyship was entered into. See, also, *First National Bank of Seattle v. City Trust Safe Deposit Surety Co. et al,* 114 Fed. 529, 52 C. C. A. 313; *Richards Brick Co. v. Rothwell,* 18 App. D. C. 516."

This case was affirmed by the United States Supreme Court in 208 U. S. 404, 52 L. Ed. 547, in which Mr. Justice Brewer, after quoting from *Prairie State Bank v. United States,* said:

"It seems unnecessary to again review the authorities. It is sufficient to say that we agree with the views of the circuit court of appeals, expressed in its opinion, in the present case.

" 'Whatever equity, if any, the bank had to the fund in question, arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles,

> entitled to assert the equitable doctrine of subrogation, but it is equally clear that the bank was not, for it was a mere volunteer, and under no legal obligation to loan its money."

In *Hardaway & Prowell v. National Surety Co.*, 150 Fed. 465, it appeared that the assignee of a public contract partially completed it. There was a portion of the contract price held back by the Government. The contractor applied to the plaintiffs in the action for financial assistance, which was furnished, and the work was completed. Whereupon, plaintiffs in the action contended that, having an assignment of the funds in the hands of the Government from the contractor, they were entitled to payment prior to the claims of those who had furnished materials before the default, and prior to the right of the surety company to have the funds in the hands of the Government devoted to the payment of the claims. Part of the money in the hands of the Government had been earned prior to the default. The Court, speaking through Judge Lurton, then Circuit Judge, afterwards a member of the Supreme Court of the United States, said:

> "The attitude of Hardaway & Prowell as mere lenders of money is not, in substance, changed because that money was used in paying for labor and materials. Nor is the character of the claim, in its essence, changed by presenting it in the form of an account for the labor and materials which was procured

by its application. Manifestly, if the money had been loaned to Coyne under the express agreement that he was to use it in supplying labor and materials to be used in this work, and it was so used, the debt would still be a debt for money advanced, and not a debt for labor and materials, though every dollar was so applied. The same result must follow if Hardaway & Prowell, as mere superintendents, or managers for Coyne, used the money advanced by them in paying for like supplies. In both hypotheses the labor and materials would be supplied by Coyne, although the money which paid for them had been advanced by the appellants. Would a bank lending money to Coyne to be used by him in carrying out this contract be entitled to the protection of such a contractor's bond simply because the money was to be used, and was, in fact, used, in paying for labor and materials which were used in the work? If not, how much stronger is the equity of appellants even if they themselves used the money in paying for labor and materials which went into the work, if, in so applying it, they were merely acting as the agents or superintendents of Coyne? Money loaned would not be labor and materials. The labor hired and the persons actually supplying them with labor and materials might be protected as persons furnishing labor and materials to them as sub-contractors, or as mere

superintendents standing for and representing Coyne as a principal or subcontractor. But as mere agents for Coyne advancing money to him or for him, by paying for labor and materials supplied by others, they would not be subcontractors nor persons supplying subcontractors with labor and materials. *Prairie State Bank vs. United States*, 164 U. S. 227, 252, 17 Sup. Ct. 142, 41 L. Ed. 412. One who lends money to keep a broken-down railroad in operation and to pay for labor and necessary supplies has never been regarded as entitled to the equitable lien accorded to those who actually supply labor and materials to keep the road going. *Morgan's Louisiana, etc., Ry. Co. v. Texas Central Ry. et al.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; *U. S. Trust Company v. Western Contract Co.*, 81 Fed. 454, 26 C. C. A. 472. Money borrowed and used to pay labor claims entitled the lender to no preference in the absence of an assignment of the claims. *Theobald v. Hammond*, 133 Fed. 525, 66 C. C. A. 496."

This case was affirmed by the Supreme Court of the United States in 211 U. S. 550, 53 L. Ed. 321, in which the Court holds, speaking through Mr. Justice Day, at page 561:

"The right of the surety to be subrogated had attached to the fund, and was superior to any rights which Hardaway and Prowell had as assignees of Coyne. *Prairie State National*

Bank v. United States, 164 U. S. 227", etc.

In the case of *Title Guaranty & Surety Co. v. Dutcher*, 203 Fed. 167, Judge Cushman, one of the judges of the District Court for the Western District of Washington, applied to a state contract (not federal) the principles announced in Prairie State Bank, and in the Henningsen case and the Hardaway & Prowell case, all of which applied to Federal contracts. In that case, the contractor defaulted on the work and left unpaid bills for labor and material. In the prosecution of the work he had borrowed certain money and had given to the lender assignment of the bonds or warrants to be issued by the city, as was given to the Bank in this case. Judge Cushman says, at page 169:

> "The question thus presented is whether the right of the contractor's surety, or that of the contractor's assignees to the bonds and funds held by the city on account of the contract, is superior. This point is concluded in this circuit in favor of complainant by *First National Bank v. City Trust, etc.*, 114 Fed. 529, 52 C. C. A. 313; *Henningsen v. U. S. F. & G. Co.*, 143 Fed. 812, 74 C. C. A. 484; *Id.*, 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547. The following cases are to the same effect: *Prairie State Bank v. U. S.*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; *Hardaway & Prowell v. National Surety Company*, 150 Fed. 465, 471, on petition for rehearing at 473, 80 C. C. A. 283. The complainant will be

allowed interest at the legal rate from the actual dates of the payments made by it for the completion of the contract, and for the unpaid labor and material claims which it satisfied. These dates are not disclosed in the statement of facts. If the bonds of the city are already issued and bearing interest, allowance will be made so as to only allow complainant interest at the legal rate upon its payments."

In the case of *First Nat. Bank of Seattle v. City Trust, Safe Deposit & Surety Co.*, 114 Fed. 529, the Circuit Court of Appeals for this Circuit held that the surety company was entitled to subrogation for all amounts unpaid without consideration of the percentage to be retained under the contract in preference to the assignee of contractors. In that case, the contractor entered into a contract with the City of Seattle to do certain paving. They applied to the First National Bank of Seattle for a loan of money to enable them to carry out their contract and accompanied their application with a promise to provide a reliable surety company bond to the city and to assign to the bank all moneys, bonds and warrants that should become due from the city under the contract for the months of August, September, October and November, 1900. Upon these conditions, the bank promised to loan and advance the necessary money. Your Honors will notice that this was a stronger case in favor of the Bank than the case at bar, because there is no contention in the case at bar that there was any agree-

ment for the borrowing of the money prior to the giving of the bond by the surety company, or that there was any expressed promise to make an assignment of the warrants and bonds prior to the loaning of the money, and the lending of the money and the assignment of the bonds in this case were subsequent, by quite a length of time, to the filing of the bonds by the surety company. The court, speaking through Judge Gilbert, says, at page 532:

> "Applying these principles to the present case, it is clear that the lien of the surety company upon all funds now retained in the posession of the city, and applicable upon the contract, had its inception at the time when it entered into the contract of suretyship, and that subsequent to that date the contractors, McCauley & Delaney, had no power to create a lien upon the payments to be made by the city, and make it paramount to the lien of the surety. That the right of the bank in this instance is subsequent to the surety's lien is not to be questioned. The arrangement which is said to have been made between the bank and the contractors just prior to the execution of the bond cannot affect the rights of the surety. That arrangement, so far as the pleadings inform us, was not in the form of a binding agreement, and was not obligatory upon either party thereto; and, if it were, it could not take precedence of the lien of the surety by virtue of the bond which it entered into simultaneously with the execu-

tion of the contract, unless it was known and assented to by the surety. There is no intimation that the surety assented to or had notice of such an agreement. One who becomes a surety for the principal upon such a contract as is disclosed in this case may not be deprived of his lien by the secret contract or agreement into which his principal may have entered. By abandoning the contract the contractors lost the right to compel the city to pay them any sum whatever on account of the work which they had done. Their assignee, the bank, stood in no better position than they. The city undoubtedly had the right to declare the contract and all unpaid sums which it had promised to pay thereunder forfeited. That it had this right is not disputed, but it is said that the city has not exercised it, and that, therefore, the right cannot avail the surety. But the true inquiry is, not what has the city done, but what had it the right to do? It had the right, if it had itself assumed the completion of the abandoned work, to retain for its own protection not only the stipulated 30 per cent., but all sums then due or earned under the contract, and no assignment by the contractors could defeat that right. Among the obligations of the contractors was included the duty to pay all claims for work, labor and material. The surety, by the terms of its bond, had guaranteed that the contractors would pay 'all just claims for work, labor, or material furnished in

the execution of the contract'. The surety's obligation to pay liens and claims outstanding when the contract was abandoned was not limited in extent to the reserved 30 per cent. of the money then earned by the contractors, but it included the full sum of the unpaid claims, amounting to $3,161.38. In the Prairie State Bank case the court expressly declared that the right of Hitchcock, the surety, was not limited to the 10 per cent. reserved, but that it was a right to 'resort to the securities and remedies which the creditor, the United States, was capable of asserting against the debtor, Sundberg & Co.' So, in the case before the court, when the surety assumed the burden of the contract, it stood in the position of the city, so far as the unpaid stipulated sums under the contract were concerned, and it acquired the city's right so far as it might be necessary to resort to the same to reimburse it for all its outlay in completing the work. We think the right of the surety company went that far, and no farther; and if it appeared upon its own bill herein, or in that of the intervenor that the money of the latter so advanced to the contractors under its agreement went into the improvement, so that the surety company acquired the benefit thereof, and availed itself of the same, and thereby acquired, on the completion of the contract, a profit,—or, in other words, if the moneys which are now retained by the city, if paid to the surety com-

pany would more than repay it the total amount of its expense incurred in completing the contract,—equity would require that the excess be paid to the bank, rather than to the surety. The right of subrogation has its origin not in contract, but in equity, and it goes no farther than the strict demands of equity and justice demand." * * *

"Counsel for the appellant cite and rely upon the decision of the Supreme Court of the State of Washington in *Dowling v. City of Seattle*, 22 Wash. 592, 61 Pac. 709,—a decision which it may be conceded announces a doctrine directly at variance with that of *Prairie State Nat. Bank v. U. S.* In the Dowling case it was held that orders drawn by a contractor on sums to become due on a contract with the city carried an equitable assignment of the fund, and, being valid when made, they were not rendered invalid by the default of the contractor, or by the assumption of the contract by the surety. The argument of the court was that, inasmuch as the city asserted no claim of right in the fund, there existed no right to which the surety could be subrogated; and that, as the contractor could not justly claim that his own assignments were invalid, neither could his bonsdmen, who had assumed the performance of the contract, so claim. The decision in that case does not involve, and neither does the present case, so far as the fore-

going discussion goes, involve, any question of the construction of a provision of the charter of the city of Seattle, or of the constitution or the statutory law of Washington. That decision, therefore, does not become a precedent which we are bound to follow."

And again Judge Cushman applied the same principles in the case of *Columbia Digger Co. v. Rechtor*, 215 Fed. 618, where the court held that the sureties upon a bond for the construction of a public improvement were equitably entitled to have the installments of the contract price paid by the municipality applied to the payment of bills for material and that materialmen receiving such money were bound to make application of payments upon materials furnished for the particular contract. The Court says, at page 630:

> "It is contended that the sureties had no equity in this money. The rule has been laid down in this circuit, under a statutory bond, similar to the one in question, that the materialman has a lien (an equitable lien) upon the funds in the hands of the city, not limited to the percentage retained under the terms of the contract, and that the surety who, upon the failure of his principal, discharges the claim of the materialman has a like lien by subrogation, superior to that of his principal's assignee. *First Nat'l Bank v. City T. S. D. & S. Co.*, 114 Fed. 529, 52 C. C. A. 313; *Henningsen v. U. S. F. & G. Co.*, 143 Fed. 810, 74 C. C.

A. 484. This is but another way of stating the rule laid down by the Washington court that the money to be paid under the contract was the very money the payment of which to the laborers and materialmen was secured by the bond. If the surety has such a lien upon the money in the hands of the city, he must retain such lien or equity in the money as far as it can be clearly traced, which the courts will protect until it is borne down by some other superior equity, and in a case of the character where, upon principles analogous to those controlling the marshaling of securities, the creditor may not realize upon such security and, over the objection of a bondsman having a potential equity in such security, apply it to an unsecured debt, depriving the bondsman of all benefit from it and hold said bondsman for the secured debt."

And also Judge Cushman states that he feels concluded by the decision of the Supreme Court of the United States and the decisions of this Circuit, even though it be contrary to the decision of the Supreme Court of the State of Washington, for, at page 631, he says:

"In *First National Bank v. City Trust, Savings Deposit & Security Co.*, 114 Fed. 529, 52 C. C. A. 313, the Circuit Court of Appeals for this circuit, upon the question of the right of subrogation of the surety to a lien upon the money held by the city to pay for work under

a contract, declined to acknowledge as controlling the decision of the Supreme Court of the State of Washington. *Dowling v. City of Seattle*, 22 Wash. 592, 61 Pac. 709. The Circuit Court of Appeals held that it was bound by a contrary doctrine. *Prairie State Nat'l Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412. Under such circumstances, the court found the case to fall within an exception to the general rule, which rule would render controlling the state's decision on a question as to the public policy of the state."

III.

A similar state of facts arose in the case of *Illinois Surety Co. v. City of Galion*, 211 Fed. 161, where Judge Day says:

"The equity of the surety company is superior to that of the bank advancing this money to the contractor, and the surety company is subrogated to the rights of the contractor, but the bank is not. *Henningsen v. United States Fidelity & Guaranty Co.*, 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547; *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; *Hardaway v. National Surety Company*, 150 Fed. 465, 80 C. C. A. 283; *United States v. Rundle*, 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505. It was the business of this bank to loan money, and not, as a national bank, to supply labor and material, to a contractor."

In re. Scofield Co., 215 Fed. 45, the Circuit Court of Appeals for the Second Circuit, held in conformity with the decisions hereinabove quoted. In that case, the question arose as to whether the surety on the bond, for the performance of public work, was entitled to a prior claim against the contract price, in the hands of the Government unpaid to the contractor, to reimburse itself for moneys paid or for claims filed against the bond in preference to the claims of general creditors in bankruptcy. The Court says, at page 50:

> "When the Fidelity Company assumed the obligation of suretyship its equity at once commenced with its obligation to see that the Scofield Company duly performed all the obligations which the contract with the government imposed upon it, including its obligations to promptly pay the laborers and materialmen. The Supreme Court in *Prairie State Bank v. United States*, 164 U. S. 227, 233, 17 Sup. Ct. 142, 41 L. Ed. 412 (1896), held that a stipulation in a building contract for the retention until the completion of the work of a certain portion of the consideration is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed, and that it raised an equity in the fund to be created. In accordance with this doctrine the equity of the Fidelity Company in this reserved fund cannot be successfully questioned. And the fact is

quite immaterial that the contract which the Scofield Company made with the government provided simply for the retention of the fund until the completion of the work. A similar provision existed in the contract in the Prairie State Bank Case, but that fact did not prevent the Supreme Court from regarding the reserved fund as withheld for the benefit of the surety, as well as for the protection of the government. The doctrine of that case was reasserted by the Supreme Court in *Henningsen v. United States Fidelity & Guaranty Co.*, 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547 (1908). These cases show that the equity of the surety who pays the debts arising under the contract will take precedence of any assignment of funds due from the government made by the contractor."

IV.

Plaintiff and appellant frankly admits that there is a direct conflict between the federal decisions above relied upon by the appellant and the decisions of the Supreme Court of the State of Washington on the same facts. The Supreme Court of the State of Washington holds that the surety is only entitled to the reserved percentages provided in the contract as obligatory reservations by the municipality of payments to be made to the contractor until the full performance of the contract, and any other funds, except the obligatory reservations, are, according to the Washington Supreme

Court, assignable by the contractor to any person whomsoever. This practice has led to serious hardship to the claimants who have furnished labor and materials in public work, especially where the bond is not sufficient to protect all claims, and lays the door wide open for fraud on the part of dishonest contractors who, upon the representation that they are borrowing money for the purpose of carrying on the work under the contract, can obtain from a banker a large payment on the strength of the assignment to the banker of the sums to become due under the contract.

We submit that both judges in the District of Western Washington should conform to this court's rulings.

SURETY IS ENTITLED TO HAVE FUNDS SO DISPERSED AS TO PROTECT IT FROM LOSS.

No question has been raised upon the hearing below as to the right of the plaintiff to prosecute this suit before it had in fact made payment to the claimants who furnished labor and materials.

In *American Waterworks & Guarantee Co. v. Home Water Co.*, 115 Fed. 171, at page 182, the Court makes the following quotation:

> " 'A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has sometimes been called a bill *quia timet*, in analogy to proceedings at the common law,

where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances.' *Redes*, Pl. 148, cited and followed by the Supreme Court in *City of New Orleans v. Christmas*, 131 U. S. 191-212, 9. Sup. Ct. 745, 33 L. Ed. 99; *Story, Eq. Jur.*, Sec. 826."

See also

Illinois Surety Co. v. City of Galion, 211 Fed. 161.

Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577.

In re Rochford et al., 124 Fed. 182, Judge Sanborn, at page 187, says:

"The jurisdiction to inquire and determine who the lawful owners of it (the fund in court) are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property in its cutody, or in its proceeds, is a power inherent in every court of equity, incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds."

The Code of the State of Washington provides

that a surety may compel an action to be brought against its principal. Remington's 1915 Code, Sec. 974, *et seq.* But this question is really academic in our present discussion, because by supplemental record it appears that the claims for labor and materials have been paid by the surety company and an assignment taken in favor of its manager.

His Honor, Judge Neterer, has attempted to distingnish the foregoing cases, decided by this Honorable Court, following the Prairie State National Bank case, upon the slightly varying facts differentiating this case from the other cases decided, but we submit that there is no distinction in principle, and that the decision of the trial court is completely at variance with the rule established by this court touching the right of the surety on public bonds to subrogation to funds in the hands of a municipality in preference to the right of the contractor or his assignee therein.

It must be borne in mind that in this particular case, the contract between the municipality and the contractor authorizes the city to withhold all sums in its hands until the labor and materials are paid. Under the general principles of suretyship, the surety would thus be entitled to have the city exercise its rights under the bond and to devote the money in its hands to the payment of the labor and materials entering into the work for which the money was especially appropriated rather than to repay a mere volunteer, like the bank, for moneys loaned to the contractor, even upon the credit, which

did not prevail in this case, of assignments made or promised to be made at or prior to the time the money was advanced by the bank.

A similar provision was found in the contract involved in *In re. Scofield Co.*, 215 Fed. p. 45, and there the Court, at page 48, says:

> "There is nothing in this record to indicate that the United States withheld the reserved percentages for the benefit of the subcontractors, unless such intention can be inferred from the language of the bond, which made it the duty of the contractor to pay promptly the subcontractors. The contract itself, in providing for withholding the percentages, does not state or explain the reason, at least so far as this record shows. It simply states that they may be withheld 'until the final completion and acceptance of the work'. This might seem to indicate that the purpose was simply to secure the government in case the work was not prosecuted promptly and faithfully, for the contract expressly provided that if for any of the reasons stated in the contract the United States found it necessary to terminate the contract, then it might deduct from the reserved percentages which it had withheld whatever sums it expended in completing the contract in excess of the stipulated price and it allowed certain other deductions to be made. And there was no authority given to pay any subcontractors or deduct from the reserved

fund any sums paid to any such persons. Nevertheless when the contract is construed in its entirety and in connection with the obligations imposed by the bond, it will be found that an equity was created in favor of the surety in the reserved fund to which it is the duty of this court to give effect."

We have quoted quite at length from this case *supra* and the entire case is illuminating in support of the plaintiff's contention in the case at bar.

We may state that in the case of *Los Angeles Rock & Gravel Co. v. Coast Construction Co.*, in the Superior Court of the State of California for Los Angeles County, the rule here contended for was applied by the court, but it seems hardly necessary for the plaintiff to cite decisions from state courts though they be at variance with the decisions of the Supreme Court of the State of Washington, inasmuch as we contend that the decisions of this Honorable Court are controlling, and the construction for which we contend has so long been the rule, especially by Your Honors, that it does not need supporting authority from state courts or other jurisdictions. We rely upon Your Honors' rulings in an unbroken line of decisions, and therefore insist that the decree of the lower court was erroneous and should be reversed, directing that the funds in the hands of the city be devoted to the payment of the materialmen and laborers, so far as same are necessary and in reimbursement to plaintiff of sums paid by it for completing the contract and in payment

of labor and materials, and the balance, if any, then paid to the bank upon its assignments.

WHEREFORE, we respectfully submit that the decree of the District Court for the Western District of Washington, Northern Division, should be reversed.

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No. 3183

In the United States
Circuit Court of Appeals
For the Ninth Judicial Circuit

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

BELLINGHAM NATIONAL BANK, THE CITY OF BELLINGHAM, MORSE HARDWARE COMPANY, WHIDBY ISLAND SAND & GRAVEL COMPANY, MORRISON MILL COMPANY, K. SAUSET, CAINE GRIMSHAW COMPANY, JOHN BIEKERT, NORMAN TRANSFER COMPANY, FRANK MIDDLESTADT, JOHN KASTNER, SAM SEIVER, BELLINGHAM CONCRETE WORKS, W. M. SEEGER, THOMAS M. LYNN and M. J. WILLIAMS, co-partners as Lynn & Williams,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, Presiding

BRIEF OF THE BELLINGHAM NATIONAL BANK, *Defendant and Appellee.*

SATHER & LIVESEY,

Solicitors for Appellee, The Bellingham National Bank.

GEORGE LIVESEY, Counsel,

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The Irish Printing Co. Bellingham Washington

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BRIEF OF THE BELLINGHAM NATIONAL BANK, *Defendant and Appellee.*

STATEMENT

As stated by appellant, the only substantial question presented in this appeal is whether the bank is entitled to have its claims paid in full by virtue of its assignments from Moran Bros., or

whether appellant has the prior equity to have the funds in the hands of the City of Bellingham devoted to the payment of claims for labor and materials before any payment is made to the bank.

The allowance by the Court of the claim of Morse Hardware Company for $133.25 was an oversight and could readily have been adjusted had that been the only error claimed on the part of appellant. The Court finds that the bank paid this sum, which shows the entry of judgment in favor of Morse Hardware Company to be a technical oversight.

ARGUMENT

It will be noted that this is an action in which all the parties, except appellant, are residents of the City of Bellingham, Washington, having their places of business in that city. The money at issue in this action is owed by the City of Bellingham for work done by citizens of Bellingham on streets in said city, and appellant's connection with the matter arose solely by the requirement of the statute law of the State of Washington, to-wit: Remington & Ballinger's Code, Sections 1159, 1160 and 1161, as amended, (Finding III, Record 110), which required Moran Bros. to supply a bond when they took the contract from the City of Bellingham for the improvement of Maryland and Iowa Streets, and the question herein would not have arisen had a personal bond been supplied by citizens.

All the parties to this suit were doing business as citizens of the State of Washington, and assumed,

as they had a right, that they were to be guided by the laws of the State of Washington, and likewise assumed, as they had a right, that the laws of the State of Washington would determine their rights.

The bank claims the right to have paid unto it as a prior claim, sufficient of the bonds due from the City of Bellingham to Moran Bros. to pay the amount due it from Moran Bros., to wit; $3033.15 on the Maryland street contract (Finding VI, Record 111), and $1781.07 on the Iowa street contract (Finding XV, Record 114). The bank's claim arises by reason of the assignment of said bonds, (Finding VI, Record 111; Finding XV, Record 114). These assignments, the Court finds, were presented to and accepted by the City of Bellingham so as to make the same valid obligation unless appellant's rights are superior, (Finding VI, Record 111; Finding XV, Record 114).

In addition to the above, the bank claims the right to have paid unto it the amount of money it advanced to Moran Bros. under and by virtue of said assignments, except $150.00 advanced on the Maryland street contract and $100.00 on the Iowa street contract, because the court finds that all of the money so advanced by the bank under said assignments, except said $150.00 and $100.00, went into the construction and improvement of said streets (Finding VII, Record 111; Finding XVI, Record 115). In this connection the court finds that the bank itself went to the trouble and expense of paying certain amounts to materialmen and laborers

on said jobs, (Finding VIII, Record 112; Finding XVI, Record 115), and if said moneys had not been advanced by the bank and paid by them, they would still be obligations against Moran Bros. and consequently against appellant, for which appellant would be liable.

That the law of the State of Washington, as decided by our Supreme Court, entitles the bank to rights prior to appellant, is well settled.

A municipal corporation that has notice of an assignment of funds due from it to any third party, or that accepts an order issued against it in favor of any third party, is bound to the same extent as any individual, and the rule as to assignments in such instances is the same as in any other case.

> "Where a contractor for the construction of water works for a city gives an order upon the city for the payment to a third person of a certain sum out of any moneys due or to become due under his contract with the city, such order, when filed with the proper accounting officer of the city, constitutes an equitable assignment of any of the funds in the possession of the city belonging to the contractor."

Dickerson vs. Spokane, 26 Wash. 292.

> "Where the contractor absconds and the improvement is completed by his bondsman, there are no rights held by the city under such a contract in or to the fund earned and assigned by the contractor to which his bondsman can become subrogated."

Dowling vs. Seattle, 22 Wash. 592.

See also to the same effect:

Seattle vs. Liberman, 9 Wash. 276.

State ex rel. Fairhaven Land Co., vs. Cheetham, 17 Wash. 131.

Fidelity Natl. Bank, vs. Henley, 24 Wash. 1.

State ex rel Bartelt, vs. Leives, 19 Wash. 589.

The identical question involved here was decided definitely in favor of the bank's position by the Supreme Court of the State of Washington in the case of *Northwestern National Bank, vs. Guardian Causualty & Guaranty Co.*, 93 Wash. 365. In the still later case of *Title Guaranty & Surety Co., vs. First National Bank of Hoquiam*, 94 Wash. 55, the Supreme Court again decided in favor of the bank's position. These cases were favorably referred to by the following cases:

National Surety Co., vs. American Savings Bank & Trust Co., Vol. 1, No. 3, Wash. Dec. 137, May 1, 1918.

State ex rel State Bank of Seattle, vs. Scott, Vol. 2, No. 5, p. 356, Wash. Dec., June 19, 1918.

Finne, vs. Maryland Causualty Co., Vol. 2, No. 7, Wash., Dec. p. 445, July 3, 1918.

Appellant relies upon the case of *Prairie State Nat'l Bank, vs. United States*, 164 U. S. 227, and *Henningsen, vs. United States Fidelity & Guaranty Co.*, 208 U. S. 404, and certain Federal decisions cited in its Brief.

The Prairie State Bank case was one involving

the rights of a bank and Surety Company as in this case, but arose out of a contract with the United States Government for the erection of a custom house, and the surety was on the bond by virtue of a United States statute requiring the same. The only question involved there was as to the conflicting claims regarding the reserved 10 per cent. authorized by the construction contract.

In the case at bar no portion of the money was reserved by the City of Bellingham under the contract. The City could retain the money for payment of laborers and materialmen, or it could pay out all the money and the bonding company could not complain. The City saw fit to accept the assignments made by Moran Bros. to the Bank, thereby recognizing the bank's claim to the bonds.

The Henningsen case, supra, likewise was a Federal contract arising out of the construction of Fort Lawton, and the surety in that instance went on the bond pursuant to a Federal Statute. *Under the Federal Statute, Sec.* 6383 *Compiled Statutes, all assignments of claims against the United States are null and void, unless executed in a certain manner, which the assignments in the United States case above referred to were not.*

Appellant cites *First National Bank, vs. City Trust, etc. Co.*, 114 Fed. 529. This decision was made in 1902, about fifteen years prior to the decision of the State of Washington above quoted. Circuit Justice McKenna dissented and showed by his opinion that he was in favor of the claim of the

bank to everything except the reserved 30 per cent. of the construction contract and if there had been no reserve, the entire amount, according to his opinion, would have been payable to the bank. In the case at bar there was no reserved amount specified in the contract.

In the case of *Hardaway & Prowell, vs. National Surety Co.*, 150 Fed. 465, the contract there was one with the United States and would naturally be governed by the United States statutes and laws, and the money involved therein was percentage withheld by the Government from time to time on estimates for work done prior to the assignment of the contract. It is clear that this case is not similar to the case at bar.

Appellant cites *Title Guaranty Co., vs. Dutcher*, 203 Fed. 167. In this case the assignee did not become such until May 6, 1911, the date when the contractor abandoned the work. The assignee prior to that time was simply an endorser on the contractor's note. This case differs from the case at bar in the following particulars also: I quote from 203 Fed. at page 168.

> "In borrowing this money, the contractor represented that it was to be used upon this *and other contracts* which he then had with the City."

In the case at bar the affirmative defense show that the identical money received from the bank went into the work that Moran Bros. had contracted for. Quoting further from said case:

"All the money borrowed by the contractor went into his general bank account with other of his money. During the time involved, he had four separate contracts with the city. No account was kept of the particular work upon which disbursements were made, and it is not shown how much, if any, of the money borrowed, or other money of his, was paid upon the contract in question."

In the case last referred to nothing appears as to whether the funds involved were reserved by the city under its contract to protect the labor and material claims.

Appellant cites *Illinois Surety Co., vs. City of Galion,* 211 Fed. 161. There is no showing in this case what the law of the State of Illinois is and it is no doubt true that if the law of Illinois were like the law of the State of Washington, the decision of the District Court of Illinois, there cited, would have been different.

Appellants cites *Columbia Digger Co. vs. Rector,* 215 Fed. 618. This case is not in point for the reason that while it quotes the law to be that a surety on a contractor's bond is subrogated to the rights of the principal, it did not involve facts similar to the case at bar.

In deciding this case, Judge Cushman in 215 Fed. and page 632, used the following language:

"While the question of the superior right or equity involved may be said, speaking broadly, to be one of general law which the federal

court will decide for itself, despite the holding of the state court, yet such statutory bonds affected by such public policy, the rights and equities incident thereto are likewise so affected; and, while the declaration of the highest court of the state concerning such rights, equities, and policy may not involve the construction of a state law, in the sense of its literal interpretation, yet it is considered that such decision is entitled to more than ordinary consideration, if it is not absolutely controlling, where, as here, it is not directly opposed to any higher federal precedent. The rule is stated as follows:

"Questions of public policy, as affecting the liability for acts done or upon contracts made and to be performed, within one of the states of the Union—when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the state as expressed in its own Constitution and statutes, or declared by its highest court."

Hartford Fire Ins. Co. vs. Chicago M. & St. P. Ry., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193, affirmed 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

In addition to the Washington cases above cited, the court's attention is called to the case of

Hipwell vs. National Surety Co., 105 N. W. 318, where it is held:

> "Where a contract, secured by bond, for the erection of a building, authorized the building committee to withhold 10 per cent of all payments for work in place until final completion and acceptance, and the contractor gave an order to pay a bank a certain sum on completion of the building, which was accepted by the building committee, to be paid out of funds due the contractor after completion and and acceptance of the building, the effect of the order was payment at that time, and, no funds remaining payable to the contractor thereafter, a claim of the surety on the bond to subrogation to the funds in the hands of the committee was without merit."

That the law of the State of Washington should control the rights of the parties hereto, see Sec. 1538, compiled Statutes.

> "Matters bearing upon the execution, the interpretation and the validity of a contract, are determined by the law of the place where the contract is made; matters connected with its performance are regulated by the law prevailing at the place of performance."

Scudder vs. Union Nat'l Bank, 23 Law Ed. U. S. Rep., page 245.

The nature, validity and interpretation of a contract are to be governed by the law of the country where the contracts are made, or are

to be performed."

Bank of United States, vs. Donally, 8 Pet. 316.

The fact that several Federal decisions make the Federal laws apparently paramount and decisive over State statutes and decisions, does not change the foregoing rule and these decisions exist only by reason of the fact that the contract was concerning a Federal subject matter.

"It is a familiar rule, that the construction and validity of a contract is governed by the law at the place where it is made. * * * * When the domicil of the parties, the situs of the property involved and the place of execution and performance of the contract are confined throughout to one jurisdiction, there is obviously no difficulty."

5 *Ruling Case Law*, page 931.

The positive authority of a decision is co-extensive only with the facts on which it is made.

Ogden vs. Saunders, 12 Wheat. 213.

"When the Federal courts find principles distinctly settled by adjudications, and known and acted upon as the law of the land in any state, they have no more right to question them or deviate from them than have the tribunals of the state in which the decisions were made."

Livingston vs. Moore, 7 Pet. 469.

"Federal Courts follow the laws of the state in which the court is held, in the absence of

legislation by Congress."

Randall vs. Howard, 2 Black, 585.

"The adjudications of appellate state courts in matters of state law constitute the law upon the points adjudged, and such decisions are binding upon the circuit court and every other court when brought before them for consideration."

Galpin vs. Page, 18 Wall. 350.

"The Supreme Court uniformly acts under the influence of a desire to conform its decisions to those of the state court on their local laws."

Mutual Assurance Soc. vs. Watts, 1 Wheat. 279.

"This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality."

Re McNeil, 13 Wall. 236.

If the above authorities state the law, the decision of the District Court should be affirmed. Appellant concedes that in the State courts of Washington the bank's rights are superior. If, therefore, the bank loses by a reversal of the decision of the lower court, then the bank has surrendered rights by submitting its claim to the United

States Court. The last of the authorities above cited says:

> "This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a Federal tribunal."

Appellant relies upon the Federal authorities cited in his brief and admits that the leading case from his standpoint is the *Prairie State National Bank vs. United States, supra.* This case, and practically all the others cited, involved rights arising by reason of a Federal statute, in a contract with the Federal government, and the attempted assignments made in that case were prohibited by the Federal statutes. *Compiled Statutes*, Sec. 6383.

The Court's attention is also called to the fact that under the contract in this case the City of Bellingham could lawfully pay out to the contractor the entire sum due the contractor as the work progressed, or it could retain all of the same if it saw fit. In other words, this case is not one involving the right to assign any fixed portion of the money due to the contractor as in the case of the *Prairie State National Bank, supra.*

We earnestly submit that the equities of the case are with the bank and that the bank should prevail.

As said by the Supreme Court of the State of Washington in the case of *Northwestern National Bank vs. Guardian Casualty & Guaranty Co.*, 93 Wash. at 646:

> "We find no merit in the claim that the bonding company has a superior equity in this fund over that of the bank. It has no equity in the fund as against the bank, which paid its money on the strength of assignments of the fund at a time when the contractors had full right to collect and dispose of the fund as they saw fit. Moreover, it is an admitted fact in this case that the money advanced by the bank was actually used by the contractors in the performance of the contract, thus diminishing the bonding company's liability by just the amount advanced. The equities are obviously with the bank."

There is only one case cited by counsel, the *City of Galion* case, that cannot be distinguished from the facts of the case at bar, and there is nothing to show but what the law of Illinois may conform to the City of Galion decision. In this state, however, the law is definite and fixed. Appellant came into the State of Washington, and the City of Bellingham to write a bond, for a consideration, and to affect contracts between residents of the State of Washington, said contract being executed in said state, performed therein and in all manner governed by the laws thereof. This being the case, the laws of the State of Washington, as construed by the highest court thereof, should prevail.

What security have citizens in the State of Washington if the Supreme Court of said State in December, 1916, and again in January, 1917, as

shown by the decisions above referred to, to-wit: *Northwestern Nat'l Bank vs. Casualty Co.*, 93 W. 365 *and Title Co. vs. First Nat'l Bank*, 94 W. 55, tells the Northwestern Bank of Bellingham, Washington, and The First National Bank of Hoquiam, Washington, and thereby the citizens of the State of Washington, that they are safe in transacting their business in a certain manner, and another bank in the City of Bellingham, guided by said decisions, acts accordingly, and then because a surety on a construction bond required by a State statute of the State of Washington, happens to be a non-resident, the bank, defendant in this case, should suffer when it has been guided by the decisions in its own court? Surely it cannot be that the Washington decisions will not control here.

In passing upon this case the court should not overlook the admission that all the money for which the bank has obtained judgment in the lower court went into the job performed under the contracts; that the case at bar does not involve the percentage authorized to be retained under the contract as in the Prairie State National Bank case and other cases cited by appellant; that the bond upon which appellant was surety was executed because a state statute required it and not a Federal statute; that the work to be performed under the bond was for the municipality of Bellingham, Washington, and not the Federal Government; that the assignments in the case at bar were not prohibited by law; and that the practical equities are with the bank and

not the surety company.

We quote from the opinion of his Honor, Judge Neterer, as found in the Record, page 152, where he says:

> "I think the statement of the facts is conclusive that the equities of the case are with the defendant bank. There is no inhibition in the contract against the assignment of any of the warrants, nor is there any stipulation against the issuance of any of said warrants during the progress of the work. The city could lawfully issue to the contractors the entire sum as the work progressed. In this the rights of the parties are distinguished from the issue in *Prairie City Bank vs. United States*, 164 U. S. 227, relied upon by plaintiff. The bank in making the advancements applied the sums advanced to the payment of the claims guaranteed by the plaintiff, and by the application of those funds reduced the liability of the plaintiff under the stipulations of its bond. The plaintiff was not injured by any act of the defendant bank except as to the sum of $100 and $150 advanced on the respective contracts, which was not thus applied."

The decree signed by the lower court did not include the $100, nor the $150.

We respectfully submit that the decision of the lower court should be affirmed.

SATHER & LIVESEY,

Solicitors for Respondent Bellingham National Bank.

GEORGE LIVESEY,

Counsel.

505 Bellingham National Bank Building, Bellingham, Washington.

No. 3184

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN MINERAL PRODUCTION COMPANY, a Corporation,
Plaintiff in Error,

vs.

F. M. HELSLEY,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

FILED
AUG 14 1918
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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resident of the County of Stevens, State of Washington. That the defendant, C. R. Cole, now is and at all times herein mentioned was a citizen of the United States and a resident of the City of Chicago, State of Illinois. That the defendant, American Mineral Production Co., now is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of South Dakota and carrying on a mining business in the County of Stevens, said State.

2d. That on or about the 14th day of July, 1917, said defendants for and in consideration of the sum of $5,500, orally purchased from plaintiff and plaintiff sold to defendants, all of his right, title and interest in and to six motor trucks situated at the town of Valley, Stevens County, Washington, and particularly described as follows, to wit:

One 3½ Ton Signal Motor Truck, Model "M," No. 555, Motor No. 15382.

One 3½ Ton Signal Motor Truck, Model "M," No. 856, Motor No. 15444.

One 3½ Ton Signal Motor Truck, Model "M," No. 880, Motor No. 15495.

One 3½ Ton Signal Motor Truck, Model "M," No. 876, Motor No. 15480.

One 3½ Ton Signal Motor Truck, Model "M," No. No. 889, Motor No. 15488.

One 2 Ton Signal Motor Truck, Model "J," No. 196, Motor No. 14744.

3d. That said defendants, immediately after said sale, [3] took possession of said trucks and commenced to operate the same in the hauling of magne-

site from the quarries of the defendant corporation to the town of Valley in said County and State.

4th. That on or about the 18th day of July, 1917, plaintiff demanded payment of said defendants for said trucks and said defendants have failed and refused and still fail and refuse to pay the same.

WHEREFORE, plaintiff prays for judgment against the said defendants in the sum of five thousand five hundred dollars ($5,500), together with interest thereon at the rate of six per cent per annum from the 18th day of July, 1917, until paid, and for the costs and disbursements of this action and for such other and further relief as to the Court may seem just.

(Signed) L. C. JESSEPH,
ZENT & POWELL,
Attorneys for Plaintiff.

State of Washington,
County of Stevens,—ss.

F. M. Helsley, being first duly sworn, on oath deposes and says: I am the plaintiff in the above-entitled action, I have read the foregoing complaint and know the contents thereof and the same are true.

(Signed) F. M. HELSLEY.

Subscribed and sworn to before me this 10th day of December, 1917.

(Signed) R. A. THAYER,
Notary Public in and for the State of Washington,
Residing at Colville, Washington.

[Endorsements]: Amended Complaint. Due service of the within Amended Complaint accepted this 19th day of December, 1917. (Signed) Post, Russell, Carey & Higgins, Attorneys for Defendants. Filed in the U. S. District Court for the Eastern District of Washington. December 19, 1917. W. H. Hare, Clerk. By S. M. Russell, Deputy. [4]

[Title of Court and Cause.]

Answer to Amended Complaint.

Come now the defendants and for answer to plaintiff's amended complaint, admit, deny and allege as follows:

I.

Admit paragraph I of the amended complaint.

II.

Deny that on or about the 14th day of July, 1917, or at any time, said defendants or either of them, in consideration of the sum of fifty-five hundred dollars ($5,500) or any sum, orally or otherwise agreed to purchase the personal property mentioned in paragraph II of the amended complaint, or any part thereof.

III.

Deny that immediately after said alleged sale, or at all, the defendants or either of them took possession of said trucks or any of them and commenced to operate the same as alleged in paragraph III or at all.

IV.

Deny each and every allegation contained in

paragraph IV of the amended complaint.

FIRST AFFIRMATIVE DEFENSE.

Further answering the plaintiff's amended complaint and as an affirmative defense thereto, the defendants allege that any negotiations between the plaintiff and the defendants or either of them for the sale of said trucks was entirely oral; that the [5] defendants did not accept or receive any part of the said goods or give anything in earnest to bind the alleged bargain or in part payment, or sign any note or memorandum in writing of the alleged bargain, and that the alleged contract of sale mentioned in plaintiff's amended complaint is void under section 5290 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

WHEREFORE, defendants pray that this action be dismissed and that they recover their costs herein.

(Signed) POST, RUSSELL, CAREY & HIGGINS,
Attorneys for Defendants.

State of Washington,
County of Spokane,—ss.

Stephen V. Carey, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and the facts therein stated are true.

(Signed) STEPHEN V. CAREY.

Subscribed and sworn to before me this 22d day of January, 1918.

(Signed) H. V. DAVIS,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Answer to Amended Complaint. Personal Service of the within Answer is hereby admitted at Spokane, Washington, the 22d day of January, 1918. (Signed) Zent & Powell, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington. January 22, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [6]

[Title of Court and Cause.]

Reply.

Comes now the above-named plaintiff and for reply to the affirmative matter contained in the answer of the above-named defendants alleges as follows:

I.

Denies each and every allegation contained in said affirmative defense.

WHEREFORE said plaintiff prays for judgment as in the complaint demanded.

(Signed) L. C. JESSEPH,
ZENT & POWELL,
Attorneys for Plaintiff.

State of Washington,
County of Stevens,—ss.

F. M. Helsley, being first duly sworn, on oath deposes and says: I am the plaintiff in this action, I

have read the foregoing reply, know the contents thereof, and the same are true.

(Signed) F. M. HELSLEY.

Subscribed and sworn to before me this 28th day of January, 1918.

(Signed) L. C. JESSEPH,
Notary Public in and for the State of Washington,
Residing at Colville, Washington. [7]

[Endorsements]: Reply. Due service of the within Reply accepted this 29th day of January, 1918. (Signed) Post, Russell, Carey & Higgins, Attorneys for Defendants. Filed in the U. S. District Court for the Eastern District of Washington. January 30, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [8]

[Title of Court and Cause.]

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and against the defendant American Mineral Production Company, and assess the amount of his recovery at five thousand seven hundred and fifty-three dollars ($5,753).

(Signed) S. A. SPEAR,
Foreman.

[Endorsements]: Verdict. Filed April 24, 1918. W. H. Hare, Clerk. [9]

[Title of Court and Cause.]

Motion for New Trial.

Comes now the defendant, American Mineral Production Company, and moves the Court for an order to set aside the verdict rendered by the jury in said cause and to set aside the judgment entered thereon, which verdict was rendered on the 24th day of April, 1918, and judgment thereon was entered on the 25th day of April, 1918, and to grant a new trial in said cause upon the following grounds:

1. Error in law occurring at the trial and excepted to by the defendant.
2. Insufficiency of the evidence to justify the verdict.
3. That the judgment is against the law.

As to the errors in law occurring at the trial to which exception was taken at the time the defendant, American Mineral Production Company, specified the particular errors which it relies upon, to wit:

(a) Error of the Court in denying the said defendant's challenge to the sufficiency of the evidence and the motion for a judgment at the close of plaintiff's case.

(b) Error of the Court in denying the defendant's challenge to the sufficiency of the evidence and a motion for judgment for the defendant, which motion was made at the close of the evidence of the entire case.

(c) Error of the Court in entering judgment in the cause. **[10]**

As to the points of the insufficiency of the evi-

dence to justify any verdict or judgment in favor of the plaintiff, the defendant specifies the particulars thereof as follows:

The defendant contends that most favorable evidence to the plaintiff is to the effect that the evidence shows that the plaintiff and C. R. Cole, who was president of the American Mineral Production Company, had some negotiations relating to the sale and purchase of the interest of the plaintiff in and to some auto trucks and his entire interest in and to a certain truck line known as the Cashmere truck line and owned by C. R. Cole and the plaintiff in equal interests. That the evidence does not show that C. R. Cole was acting as an officer of the American Mineral Production Company in these negotiations. That it was contemplated by C. R. Cole and the plaintiff that the negotiations when reduced to definite terms were to be set forth in a written contract signed by the parties to the said negotiations. The evidence does not show that any contract in writing or otherwise was ever made between the defendant, American Mineral Production Company, and the plaintiff, nor between C. R. Cole and the plaintiff, as was contemplated by said negotiations.

This motion is based upon the pleadings and papers on file, the minutes of the court, including not only the clerk's minutes but any notes or memorandum which may have been kept by the Judge of this court in the trial thereof, and also the reporter's transcript of his shorthand notes of said trial, and upon the exhibits introduced at the trial of said cause.

Dated at Spokane, Washington, this 30th day of April, A. D. 1918.

(Signed) POST, RUSSELL, CAREY & HIGGINS,

Attorneys for the Defendant, American Mineral Production Company. [11]

I certify that the filing of the within motion is allowed this 30th day of April, 1918.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Motion for New Trial. Personal service of the within Motion for New Trial after filing is hereby admitted at Spokane, Washington, the thirtieth day of April, 1918. (Signed) Zent & Powell, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington. April 30, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [12]

[Title of Court and Cause.]

Order Overruling Motion for New Trial.

This cause coming on to be heard this 20th day of May, 1918, upon the motion of the above-named defendant, American Mineral Production Company, a corporation, for a new trial, plaintiff appearing by his attorney, L. C. Jesseph, and the defendant American Mineral Production Company appearing by its attorneys, Post, Russell, Carey & Higgins, and the Court having heard the arguments of counsel and being fully advised in the premises,—

IT IS HEREBY ORDERED that said motion be and the same is hereby overruled, to which ruling the defendant American Mineral Production Company excepts and the exception is allowed.

Done this 20th day of May, 1918.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Overruling Motion for New Trial. Personal Service of the Within Order is Hereby Admitted at Spokane, Washington, the 20th Day of May, 1918. (Signed) Post, Russell & Higgins, Attorneys for Defendant. Filed in the U. S. District Court for the Eastern District of Washington. May 20, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [13]

[Title of Court and Cause.]

Judgment.

This cause coming on to be heard this 23d day of April, 1918, before the Court and a jury upon the issues of law and fact raised by the pleadings, and plaintiff appearing in person and by his attorneys, L. C. Jesseph and Zent & Powell, and the defendants appearing by their attorneys, Post, Russell, Carey & Higgins, and all the evidence having been adduced and the jury having received said cause and returned its verdict into court finding for plaintiff against the defendant, American Mineral Production Company, a corporation, in the sum of $5,753 and the defendant C. R. Cole having heretofore been ordered dis-

for a judgment dismissing said cause as to the defendant C. R. Cole was granted, and the court was of the opinion at the close of the entire case that the evidence was sufficient to warrant the Court in submitting the case to the jury as to whether or not there was a sale of said trucks by the plaintiff to the defendant American Mineral Production Company and a breach of said contract of sale. **[16]**

[Title of Court and Cause.]

Before Hon. FRANK H. RUDKIN, Judge Presiding, and a Jury.

APPEARANCES:

For the Plaintiff:

L. C. JESSEPH, Esq., Colville, Washington.

W. W. ZENT, Esq., Spokane, Washington.

For the Defendants:

Messrs. POST, RUSSELL, CAREY & HIGGINS.

STATEMENT OF FACTS.

BE IT REMEMBERED that the above-entitled cause came on regularly for hearing in the above-entitled court on Tuesday, April 23, 1918, at 10:00 A. M., before the Hon. Frank H. Rudkin, Judge presiding, and a Jury, the plaintiff being represented by his counsel, L. C. Jesseph, Esq., of Colville, Washington, and W. W. Zent, Esq., of Spokane, Washington, and the defendants being represented by their counsel, Messrs. Post, Russell, Carey & Higgins.

Thereupon a jury was duly empaneled and sworn to try the cause, and thereafter the following proceedings were had:

Testimony of F. M. Helsley, in His Own Behalf.

F. M. HELSLEY, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. JESSEPH.)

Q. Your name is F. M. Helsley?

A. Yes, sir. [17]

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. You are a married man? A. Yes, sir.

Q. And you are living in the city of Spokane at this time? A. At this time; yes, sir.

Q. Are you acquainted with the American Mineral Production Company? A. Yes, sir.

Q. And with Mr. Cole, the other defendant in this case? A. Yes, sir.

Q. How long have you known of the American Mineral Production Company?

A. If I remember right a year ago, about the middle of March, the first I met them.

Q. How long have you been acquainted with Mr. Cole?

A. I think Mr. Cole came to Valley about the 25th —between the 25th and the last of June, if I remember right, of last year.

Q. What business are you engaged in at this time?

A. I am working for the Yuba Manufacturing Company.

Q. Did you have any business transaction with

(Testimony of F. M. Helsley.)

Q. On what day was that?

A. On the 13th day of July, Saturday, I believe.

Q. What was the result of these negotiations?

A. Why, they agreed to take over all of the indebtedness due or outstanding bills and give me $5,500 and release me.

Q. Five thousand five hundred dollars for your interest? A. Yes, sir.

Q. When was the money to be paid?

A. On Wednesday, the following Wednesday; I think that would be the 18th.

Q. Who was present at the time the negotiations were concluded?

A. Mr. Cowan, Mr. T. P. Smith and C. R. Cole.

Q. And yourself? A. And myself.

Q. And where were the negotiations concluded?
[20]

A. At the Spokane & Eastern Trust Company's place of business.

Q. Right after this, what was done with the trucks?

A. The company proceeded to operate them.

Q. What did you do?

A. Well, I proceeded to leave Valley.

Q. Before you left Valley what did you do with reference to the trucks?

A. I turned them over to Mr. Brunt and Mr. Smith, who took charge of them.

Q. Who was Mr. Brunt?

A. Well, as far as I could learn, he was their managing director, or something like that.

(Testimony of F. M. Helsley.)

Q. Did he have anything to do with the business of the American Mineral Production Company at Valley?

A. Until Mr. Cole came, and after he came he seemed to have everything to do, all the say.

Q. How long did the company operate the trucks?

A. One week, up until Saturday night.

Q. What did you say when you turned the trucks over? A. I recommended a foreman for them.

Q. With reference to the trucks, I mean?

A. Well, Mr. Brunt told me that the company had bought them, and that I was released, and that they were going to operate them.

Q. Did you have some men there running the trucks? A. Yes, sir, I had a full crew of men?

Q. What did the company do with reference to those men?

A. They put them all to work and raised their wages.

Q. Working at what? A. At driving these trucks.

Q. What was done, if anything, about a foreman?

A. They took the foreman that I recommended.

Q. Who? [21] A. Mr. Bunyard.

Q. What did they wish him to do?

A. To see to the running of the motor trucks and the gasoline and oil.

Q. Did you have some gasoline on hand?

A. Nearly a carload.

Mr. CAREY.—Do you pretend to know this of your own knowledge? A. I certainly do.

(Testimony of F. M. Helsley.)

Mr. CAREY.—Are you testifying now concerning things that happened after you made this alleged deal in Spokane? A. Am I what?

Mr. CAREY.—I think you said that when you came down here to Spokane you did not go back to Valley at all? A. Yes, sir; I went back.

Mr. CAREY.—Oh, very well.

Mr. JESSEPH.—Q. Were you at Valley at the time the company took these trucks? A. I was.

Q. What did you do about your oil and your gas?

A. That was considered in the sale to the company.

Q. What did you do with it?

A. I turned the keys over to their foreman, Mr. Bunyard and Mr. Brunt.

Q. Did you have it stored there? A. Yes.

Q. And you say when you made the deal you turned over the keys to this house to them?

A. To the oil and gas house, yes.

Q. How much oil and gas was there?

A. Well, there was half a carload of gasoline and two barrels of cylinder oil.

Q. Do you know who paid the men for the work they did in [22] operating the trucks, and who paid the foreman, Mr. Bunyard's wages?

A. The American Mineral Production Company.

Q. At the time you were negotiating here and this deal was closed, as you have testified, at the Spokane & Eastern Trust Company, did Mr. Cole say anything about taking over the trucks?

A. He told Mr. Smith to, yes.

(Testimony of F. M. Helsley.)

Mr. CAREY.—Who told Mr. Smith?

Mr. JESSEPH.—Cole told Smith to take over the trucks.

Mr. CAREY.—When was this, Mr. Helsley?

A. On Saturday.

Mr. JESSEPH.—Q. What did the company do, so far as your knowledge is concerned, about the payment of any of the bills?

A. Well, the grocery bill for the boarding-house that I was running was paid by the company. Mr. Kulzer took a bill in of $303, I believe. They took that in and agreed to pay it. The Firestone Tire & Rubber Company, I owed them something over $600. Mr. Smith went over there and had it segregated so that he would know which one to charge each bill to. There was three bills, the total amount, and he got that straightened out, so that he would know who to charge for these tires.

Q. After the 14th day of July did you have anything to do with the trucks?

A. Nothing whatever.

Q. Did you ever have them in your possession or did you ever operate them? A. I never did.

Q. Did you owe your truck driver some money when the trucks were taken over by the company?

A. I did.

Q. What was done with those items?

A. That was paid by the company.

Q. By the American Mineral Production Company? [23]

(Testimony of F. M. Helsley.)

A. By the American Mineral Production Company.

Q. Have you ever been paid the $5,500?

A. Not a dollar of it.

Q. Have you demanded payment of it?

A. Through this suit, yes, is all.

Cross-examination.

(By Mr. CAREY.)

Q. When did you say you first had business relations with the Mineral Company, Mr. Helsley?

A. If I remember right, it was in March a year ago.

Q. What was the nature of your relation at that time?

A. I was trying to secure the contract for the hauling of the magnesite.

Q. Did you secure the contract?

A. About the last of March, yes.

Q. In what name did you secure that contract?

A. Cashmere Truck Line.

Q. Cashmere Truck Line was a partnership, was it? A. It was.

Q. Consisting of yourself and who else?

A. John Wilson.

Q. He was from Wenatchee? A. Yes, sir.

Q. And you came from Wenatchee, did you?

A. Came from Cashmere.

Q. At the time you made this contract in the latter part of March for hauling, did you have any trucks? A. Yes, sir.

(Testimony of F. M. Helsley.)

Q. How long did you have them prior to the contract?

A. Well, before—the four were bought within two years.

Q. How is that?

A. There was four of them bought within two years. [24]

Q. The trucks that you afterwards used on this hauling up here in Valley?

A. Yes, sir; part of them, three of them.

Q. Did you buy any other trucks especially to carry out this contract? A. Yes, sir.

Q. From whom did you buy those?

Mr. JESSEPH.—I object to that as improper cross-examination.

The COURT.—I don't know what it is leading up to. It may lead to something material.

A. The Waterhouse-Sands Motor Company.

Q. You bought those trucks on some sort of monthly payment plan, did you? A. Yes, sir.

Q. I now hand you a document and ask you if that is the hauling contract between yourself and the American Mineral Production Company.

Mr. JESSEPH.—I object to it as not proper cross-examination. It is not competent, relevant or material.

Mr. CAREY.—It is the contract under which this series of operations started, your Honor.

Mr. JESSEPH.—There is no issue between us as to that, I think.

The COURT.—It will be admitted.

(Testimony of F. M. Helsley.)

A. Yes, sir.

Q. That is the contract under which you and your partner, Mr. Wilson, of Wenatchee, under the name of the Cashmere Truck Line, started to haul magnesite for the American Mineral Production Company? A. Yes, sir.

Mr. CAREY.—I offer this contract in evidence.

Whereupon said contract was admitted in evidence and marked Defendants' Exhibit 1. **[25]**

Q. How long did you and your partner, Mr. Wilson, continue to operate under that contract?

A. Until the first of June.

Q. What happened about the first of June?

A. Mr. Cole, or the American Mineral Production Company, bought Mr. Wilson's interest.

Q. You have personal knowledge of those negotiations under which Mr. Wilson sold his interest, do you? A. Nothing more than the amount.

Q. How is that?

A. Nothing more than the amount he received.

Q. That is the only thing you know about it?

A. About all, yes.

Q. You are sure of that, now?

A. Why, I was present. I don't recall everything that was transacted, no.

Q. Weren't you present at the time and place when that contract was made? A. I was, yes.

Q. Where was it made?

A. In your office.

Q. And who else was there?

A. I think Mr. Smires.

(Testimony of F. M. Helsley.)

Q. And who else?

A. John Wilson, and a man by the name of Mandell.

Q. And you knew all about him, didn't you? The contract was negotiated right there in my office and executed in my office?

A. I knew the contents of the contract, yes.

Q. Did you have anything else to do with that contract yourself?

A. If I remember rightly I signed it.

Q. You signed that contract yourself?

A. I think so, yes. [26]

Q. I now hand you a document and ask you if that is the original contract under which your partner, Mr. Wilson, undertook to sell out his interest?

A. Yes, sir.

Q. Who purported to sign this contract on behalf of Mr. Cole? A. Mr. Smires.

Q. Who is Mr. Smires?

A. Why, at that time I understood he was superintendent.

Q. Mr. Cole was not personally present?

A. No, sir.

Q. And who was this man Mandell who signed the contract?

A. He was the Waterhouse-Sands representative.

Q. What interest did the Waterhouse-Sands Motor Company have in the transaction?

A. Well, we were buying it from them on contract.

Q. You were buying from them on contract?

A. We were, Mr. Wilson and I.

(Testimony of F. M. Helsley.)

Q. And your contract of purchase provided that you should not sell without their consent?

A. It did.

Q. And at the time this contract was made there was a large amount on the purchase price still due Waterhouse-Sands Motor Company, is that correct?

A. Yes, sir.

Q. And at the time you came down here to Spokane, came down to my office for the purpose of executing this contract, there wasn't any representative of the Waterhouse-Sands Motor Company present, was there, you telephoned over to Seattle and had Mr. Mandell come over?

A. I don't know. Some of us telephoned.

Q. Either you or your partner, Mr. Wilson, telephoned? A. Yes. [27]

Q. And in response to your request, Mr. Mandell did come over, did he not? A. Yes, sir.

Q. And he signed this contract consenting to the sale, is that correct? A. Yes, sir.

Mr. CAREY.—We now offer this contract in evidence as an exhibit.

Thereupon said contract was admitted in evidence and marked Defendants' Exhibit 2.

Q. This contract of purchase was dated June 1st, 1917; is it not, Mr. Helsley?

A. I don't remember the exact date, no. Something near that.

Q. That is correct, is it? A. Yes, sir.

Q. Now, before this contract was executed, both you and Wilson were up at Valley personally look-

(Testimony of F. M. Helsley.)

ing after the business of hauling? A. Yes, sir.

Q. And you and he as copartners were in possession of the trucks, operating them? A. Yes, sir.

Q. And up to that time you had never seen Mr. Cole, had you?

A. No, sir; I had never seen the gentleman.

Q. And did not see him for something like five or six weeks after that, did you?

A. It was not that long. Something like three weeks; between two and three weeks.

Q. Well, anyway, up to the date of this contract, you and your partner were in possession of the trucks, operating them up at Valley, hauling magnesite? A. Yes, sir.

Q. Then after this contract was executed, your partner Wilson went back to Wenatchee, did he not?

[28] A. I don't know where he went.

Q. Well, he went away from Valley, and went away from Spokane? A. Yes, sir.

Q. And went somewhere. And you continued in possession of the trucks, did you not?

A. Yes, sir.

Q. And continued to operate them just as you had done before, hauling magnesite?

A. Well, not exactly, no. Mr. Smires, the superintendent, had quite a lot to say about the operation.

Q. You were in charge of them, operating them?

A. Yes, sir.

Q. Under the original contract? A. Yes, sir.

Q. Some time later Mr. Cole came out from Chicago, did he not? A. He did.

(Testimony of F. M. Helsley.)

Q. And when was that, if you recall?

A. Why, something near the 25th—between the 25th and the 1st of July, I believe—the 25th of June and the 1st of July, I believe; I cannot recall just the date.

Q. And he went up to Valley, did he?

A. He did.

Q. Did you see him there? A. I did.

Q. Did you talk to him about those trucks?

A. Well, about the contract, yes.

Q. About the contract of hauling? A. Yes.

Q. That is the first contract we introduced in evidence? A. Yes, sir.

Q. You had no conversation with him at Valley concerning the purchase of your interest? [29]

A. Yes.

Q. When was that?

A. Well, that was after the 10th of July, I believe; I am not certain.

Q. It was a very casual talk, wasn't it?

A. Well, no. It led up to the final agreement here in Spokane between him and I.

Q. Anyway, what you claim was the final agreement was made in Spokane? A. Yes, sir.

Q. And you say it was at the Davenport Hotel and the Spokane & Eastern Trust Company?

A. At the Spokane & Eastern Trust Company, yes.

Q. Did you have any conversation at the Davenport Hotel about it? A. Yes.

Q. Was that before or after the conversation at

(Testimony of F. M. Helsley.)

the Spokane & Eastern Trust Company?

A. Before.

Q. On the same day? A. Yes, sir.

Q. Then you went down to the Spokane & Eastern Trust Company and had a conversation down there? A. Yes, sir.

Q. And you say that you and Mr. Smith, the bookkeeper, Mr. Cole and Mr. Cowen were present?

A. Yes, sir.

Q. Mr. Cowan was an attorney?

A. For me, yes.

Q. And acting for you? A. Yes, sir.

Q. This was on what day? [30]

A. I think Saturday, the 13th of July.

Q. Did you come down from Valley especially to see Mr. Cole on this business at that time?

A. I think so, yes.

Q. What had you been doing in Valley just immediately before he came down?

A. I had not been doing anything from the first of July, hauling very little; nothing like the contract called for.

Q. There wasn't very much hauling going on?

A. No, very little.

Q. You had been hauling some, however?

A. Very little, yes.

Q. You had been hauling some? A. Yes.

Q. With these trucks? A. Yes.

Q. Then on the 13th of July you came to Spokane and had this conversation with Mr. Cole?

A. Yes, sir.

(Testimony of F. M. Helsley.)

Q. What day of the week was that, if you recall?

A. On Saturday, I recall; the 13th I believe.

Q. And you say that he agreed to pay you $5,500 for your interest? A. Yes, sir.

Q. Was there any conversation between you as to the amount of the purchase price still unpaid to the Waterhouse-Sands Motor Company?

Mr. JESSEPH.—I object to that as not proper cross-examination.

Mr. CAREY.—It is a part of the consideration.

The COURT.—Whatever was said during these negotiations is proper cross-examination.

A. What is the question?

Q. I say, was there any conversation between you and Mr. Cole [31] at that time, at the Spokane & Eastern Trust Company, concerning the amount of the unpaid purchase price due to the Waterhouse-Sands Motor Company?

A. Yes, he asked me.

Q. Did you tell him? A. I did not.

Q. Why didn't you? A. I didn't know.

Q. You didn't know what the amount was?

A. I did not.

Q. You say, however, that his agreement was, and the part consideration of it was that he was to assume this indebtedness due on the trucks?

A. Yes, sir.

Q. And you didn't know what it was?

A. I did not.

Q. And therefore did not tell him?

A. I did not.

(Testimony of F. M. Helsley.)

Q. Was there any understanding between you at any time that you were to find out what that unpaid balance was? A. There was not.

Q. He just agreed to assume this unpaid indebtedness, whether it was large or small?

A. He did.

Q. Without knowing what it was, is that correct?

A. He knew somewheres near, undoubtedly.

Q. Who told him what it was somewhere near?

A. I did not.

Q. You never made any statement to him one way or the other as to what the unpaid balance was?

A. I did not, no more than to tell him that I didn't know what it was. I told him that. [32]

Q. Had you incurred any bills to third parties in connection with the operation of the trucks that were then unpaid, at the time you had this conversation with Mr. Cole, on Saturday, July 13th?

A. Yes, sir.

Q. Did you tell him the amount of those unpaid bills? A. As near as I could.

Q. What did you tell him was the amount?

A. What I told him the total amount?

Q. Yes.

A. I did not give him any total. I told him as near as I could.

Q. Did you tell him the amounts due to the different creditors?

A. As near as I could, yes.

Q. What was the total amount, so far as you recall now?

(Testimony of F. M. Helsley.)

A. Well, I could tell you somewheres near each and every one.

Q. What were the bills, outstanding bills, you told Mr. Cole were due at that time?

A. I probably don't remember them all. I remember the large ones, the Firestone Rubber Company, something like $600.

Q. You told him that was due at that time, did you? A. I did.

Q. What were other ones?

A. John Kulzer lumber bill, if I remember right, that was two hundred and some dollars. $203, I believe.

Q. Any others?

A. I think there was a blacksmith bill that I told him of one hundred and some dollars.

Q. Do you remember any others?

A. Well, I called to his mind the grocery bill and the labor bill.

Q. Did you make any statement to him whatever as to the total amount of the outstanding bills? [33] A. No.

Q. Did you undertake to give him a list of all the creditors?

A. That is nearly all of them you have there.

Q. How do you know what I have here?

A. Well, that I have given you.

Q. The ones you have given me? A. Yes.

Q. The Firestone Tire & Rubber Company, and the Kulzer Lumber Company, and the grocery bill?

A. The blacksmith bill.

(Testimony of F. M. Helsley.)

Q. You say that was all of them?

The COURT.—And the labor bill.

Q. And the labor bill? A. Yes.

Q. And you say you did not undertake to state to Mr. Cole definitely the amount of these unpaid bills?

A. I did not.

Q. But he agreed to assume them whatever they were? A. Yes, sir.

Q. Did I understand you to say that the contract was definitely and finally closed in the Spokane & Eastern Trust Company on Saturday, July 13th?

A. I think it was Saturday, July 13th, yes.

Q. Well, whatever day this was? A. Yes.

Q. You never had any negotiations with anybody else at any time subsequently concerning the execution of this contract? A. No.

Q. Were you ever in my office in connection with this sale? A. Yes, sir.

Q. When was that?

A. The day the money was to be paid. I think it was Wednesday, [34] the 18th.

Q. That was after the meeting with Mr. Cole in the Spokane & Eastern Trust Company, on Saturday, the 13th, of course? A. Yes, sir.

Q. Now, Mr. Cole went back to Chicago on the 13th, didn't he? A. As far as I know, yes.

Q. Anyway, you did not see him around here after that? A. No.

Q. Then it was about the middle of the following week that you came into my office?

A. I think on Wednesday.

(Testimony of F. M. Helsley.)

Q. Who else was there at that time?

A. Why, Mr. T. P. Smith came in with you?

Q. Mr. Smith was a bookkeeper?

A. An accountant, yes.

Q. Was there anybody else there at that time?

A. I think Mr. Kover.

Q. Who is Mr. Kover?

A. A Waterhouse-Sands representative.

Q. How did it happen that he was there?

A. By request from the company, I think, to be there; the American Mineral Production Company.

Q. But not at your request?

A. No, sir.

Q. Now, isn't it a fact, Mr. Helsley, that you and Mr. Smith came in for the purpose of having a contract written up and that I advised you that, because of the terms of the Waterhouse-Sands contract of sale to you, it was necessary, or at least advisable, to have their representative there also. You remember that, don't you?

A. Not at this time, no. [35]

Q. You say such a thing as that did not occur?

A. It did with the transaction between Mr. Cole and Mr. Wilson, yes; I recall that.

Q. I am saying now about the other transaction?

A. I don't recall it at all.

Q. Mr. Kover, however, was there, or did come there shortly after? A. Yes.

Q. And at that time you ascertained from Mr. Kover, did you not, the amount that was still unpaid on the purchase price of the trucks?

(Testimony of F. M. Helsley.)

A. I think Mr. Smith did.

Q. Well, didn't you? A. I did not.

Q. Wasn't it disclosed right there in the meeting?

A. I don't remember.

Q. You don't remember?

A. No, I do not. Not the amount.

Q. We were all sitting there together, weren't we, in my office? A. Part of the time, yes.

Q. Weren't we all there together at the time when we were talking about the terms of the sale that would go into the written contract?

A. I don't recall it.

Q. Would you be willing to swear that that is not true, that the four of us were not there talking about the terms of this contract?

A. Mr. Kover was over for that purpose.

Q. How is that?

A. Mr. Kover was over for that purpose.

Q. But the question is, if it is not true that you and I and Mr. Smith and Mr. Kover were in my office on this occasion talking [36] over the terms of this proposed written contract? A. Yes, sir.

Q. And at that time Mr. Kover said to all of us that that amount he claimed to be due on his contract, that is the contract of sale from the Waterhouse-Sands Motor Company to you, was $10,611 and interest? A. That was it.

Q. That is correct, isn't it? A. Yes, sir.

Q. And was the written contract prepared for signature at that time? A. In your office?

Q. Yes.

(Testimony of F. M. Helsley.)

A. Yes, sir; if I remember right; I think so.

Q. And this was along about Wednesday, the 18th of July, or possibly the next day?

A. I don't remember this contract, for I never read it.

Q. I will ask you now to read it and see if it does not substantially state the substance of our conversation there on that occasion?

A. (Witness reads paper.)

Mr. JESSEPH.—If your Honor please, I object to the question here, the identification of the writing in this way. I think it is not competent or material, and it is not cross-examination. It is a writing that was never signed and never was executed.

Mr. CAREY.—That is exactly what I am trying to prove, your Honor.

The COURT.—The question asks as to whether or not these were the negotiations that the parties had there.

Mr. JESSEPH.—That is true.

The COURT.—Don't you think these negotiations are competent?

(Argument by Mr. Jesseph.) [37]

The COURT.—He may answer the question if he knows whether these were the negotiations that the parties had or not.

A. I know nothing of that paper whatever any more than I did know there was one being made up for the transaction.

Q. And if you knew on Wednesday following this Saturday upon which you had this conversation with

(Testimony of F. M. Helsley.)

Mr. Cole, in the Spokane & Eastern Trust Company, that a written contract was being prepared in my office?

A. I didn't know it was being prepared, Mr. Carey.

Q. Why, Mr. Helsley, you were there, were you not, together with Mr. Smith and Mr. Kover?

A. I was there in your office, yes.

Q. And I was getting the information from all three of you to prepare a written contract, was I not? A. You were.

Q. And in order to incorporate the terms of the deal in a written contract I ascertained from Mr. Kover that there was $10,611 still due on the contract, did I not?

A. Something like that, yes.

Q. And then the question came up as to the amount of other unpaid bills, did it not? A. It did.

Q. And was there some conversation about that?

A. As to the amount, yes.

Q. And as to who it was owing to? A. Yes.

Q. And did I ask you what unpaid bills you owed?

A. You did.

Q. And did you tell me there were unpaid bills owing as were recited in this document on page 4?

A. Yes, sir.

Q. And there are additional bills in there to what you say you [38] told Mr. Cole about on the Saturday before?

A. I told you I did not remember all of the bills that I told Mr. Cole. I had no list of them.

(Testimony of F. M. Helsley.)

Q. Anyway, there were some bills put down here in Spokane the amount of which you didn't definitely know, were there not?

A. Not here in town, I knew all of them, because we went and got the biggest ones.

Q. That is exactly what I was going to ask you. Do you remember, Mr. Helsley, that the question came up about the account of the Firestone Tire & Rubber Company? A. I do.

Q. And I insisted that I ought to know the amount of it? A. Yes, sir.

Q. And that you and Mr. Smith went out of my office and went up to their place and got a bill from them? A. Yes, sir.

Q. And came down and told me what the amount was? A. Yes.

Q. And I inserted it in this document. Do you also remember that there was an account at Chanslor & Lyon Company? A. $22, I believe.

Q. And that you went out and got their statement and brought it back to my office? A. Yes, sir.

Q. Then after getting the amount of bills you knew definitely about you then recall that there was a grocery bill due Mr. Kulzer of Valley, you remember that, do you not? A. Yes, sir.

Q. And that you did not know the amount of it?

A. Yes.

Q. But said it was a very small amount, and we decided not to hold up the deal, but simply to make reference in the contract [39] concerning the grocery bill? A. Yes, sir.

(Testimony of F. M. Helsley.)

Q. And obligate Mr. Cole to assume that bill, whatever it might be, if the contract was executed. Do you remember that? A. I remember it, yes.

Q. And the same was true of a small bill owing to L—— for blacksmithing?

A. That is not what I would call a small bill, no.

Q. Well, whatever the bill was. A. Yes.

Q. Then after we got this information all reduced to writing it was the understanding that it was to be executed before the money was to be paid over, was it not?

A. Why, no, I didn't understand it that way.

Q. Did you understand that we were drawing up a written contract, but did not intend to have it signed?

A. Why, I thought you would have it signed, yes.

Q. And you expected to sign it? A. I did.

Q. And this was on Wednesday, the 18th of July?

A. I think that was the date, yes.

Q. Five days after this conversation you had with Mr. Cole, in the Spokane & Eastern Trust Company? Yes, that speaks for itself, of course. Now, from whom did you expect to get the money if this contract was signed?

A. From the American Mineral Production Company.

Q. But through whom? A. T. P. Smith.

Q. Did you expect to get it through our office?

A. I did not.

Q. You knew that Mr. Cole was going to forward

(Testimony of F. M. Helsley.)

this money to be paid out through our office, did you not? [40]

A. Through Mr. T. P. Smith; he was the man instructed by Mr. Cole.

Q. How did you know that he was instructed by Mr. Cole?

A. I was present at the conversation.

Q. When? A. On Saturday.

Q. Did Mr. Cole tell you that the money would be forwarded to our office? A. He did not.

Q. Anyway, I told you it would, did I not?

A. I don't recall.

Q. Will you say that I did not?

A. I won't say that, no.

Q. Isn't it a fact that I showed you a telegram from Mr. Cole, in which he said he would forward the money to be paid out on our order, if the contract was executed?

Mr. JESSEPH.—Just a minute. I object to that as not proper cross-examination, and not the best evidence. If they want to prove something that was in a telegram, I think they ought to produce it.

The COURT.—I think so. I think they are entitled to see the telegram.

Q. When did you expect the money to be paid?

A. On Wednesday morning during banking hours.

Q. Well, it was not paid at that time, was it?

A. No, sir.

Q. Well, then, was there any other date set at which you expected it to be paid? A. No, sir.

Q. Isn't it true that there was some talk about it

(Testimony of F. M. Helsley.)

being paid at the opening of banking hours on Friday?

A. There was lots of talk about it, yes. [41]

Q. Well, there was some talk about it, wasn't there? A. I think so, yes.

Q. What transpired between Wednesday the 18th and Friday the 20th?

A. There was nothing in the way of money.

Q. Well, there—were there any negotiations between the parties?

A. Nothing more than Mr. Kover and I would come up to your office every little while to see if you had gotten the money.

Q. What did you come up for?

A. What did we come up for?

Q. Yes, what were you coming up to my office for?

A. To see if this money had come.

Q. So that you did know that the money was to come through us?

A. Through Mr. T. P. Smith. He was at your office from daylight to dark.

Q. Wasn't Mr. Smith at the Davenport Hotel during this time? A. Very little.

Q. Weren't you there? A. I was.

Q. Didn't you see him there?

A. At meal times and when he would go to bed.

Q. And you saw him there in the lobby with Mr. Kover? A. A time or two.

Q. So that you did not have to come up to my office to see Mr. Smith about the money, did you?

A. I did, yes.

(Testimony of F. M. Helsley.)

Q. At the time of these negotiations which were being conducted in my office, was there any of the purchase price due Waterhouse Motor Company overdue? A. There was.

Q. How much? [42]

A. I think $2,200, or something like that.

Q. And what, if anything, was Mr. Kover seeing about this overdue account?

Mr. JESSEPH.—I object to it as improper cross-examination, immaterial, incompetent and irrelevant.

Mr. CAREY.—I am referring now to the same transaction in my office.

The COURT.—I think all the negotiations between these parties in relation to this sale or transfer are so connected together that it is proper cross-examination.

A. Mr. Kover wanted his money.

Q. And was he threatening to take any legal steps to obtain it? A. At what time?

Q. At any of this time that intervened between Wednesday the 18th and a few days later, at the time you say you were waiting for money?

A. He was wanting his money, yes.

Q. Did he at that time express the intention of taking any steps to get it, or to force such payment?

A. I don't remember of it, no.

Q. Do you not recall that he was insisting both to you and to myself that unless this amount was paid at once that he would foreclose on the trucks?

Mr. JESSEPH.—I object to the question as in-

(Testimony of F. M. Helsley.)

definite, if the Court please. He does not fix the time. Now, here are some negotiations that extended, according to the cross-examination, over Wednesday, Thursday and Friday, and no time is fixed in the question as to when, if he ever, made any such threats, and when they were made.

The COURT.—If the witness can recall anything he may answer. The question is somewhat general.

Mr. CAREY.—I asked him at any time during those two days? [43]

A. I could not recall it as to those two days, no.

Q. At this time did you have an attorney acting for you? A. Why, I did and I did not.

Q. Mr. Del Carey Smith was acting for you?

A. Mr. Cowan, yes.

Q. Wasn't Mr. Del Carey Smith acting for you also? A. Yes.

Q. And he was in my office with you at different times? A. I think once.

Q. Now, I call your attention specifically, Mr. Helsley, to a conversation that took place between you, Mr. Kover, Mr. Smith and myself, on the afternoon of Thursday, the 19th of July, in the extreme east end of the lobby of the Davenport Hotel. Do you remember such an occasion?

A. I remember the occasion, yes.

Q. Do you remember that you and I met each other down at the main entrance of the Davenport Hotel, on Sprague Avenue, and walked into the lobby together and met your wife who was sitting in the Davenport, sitting in the settee there; do you re-

(Testimony of F. M. Helsley.)

member that? A. I think I recall it, yes.

Q. And then you remember we walked over to the east end of the lobby and met Mr. Kover, do you not?

A. We met Mr. Kover at the hotel, yes.

Q. He was sitting at the table there writing a telegram, was he not? A. I don't recall it.

Q. You remember that he was writing, do you not? A. I don't recall that.

Q. You remember that on that occasion I showed Mr. Kover a telegram, and told him I understood the money would be here the next day, Friday?

A. I don't remember you showing him a telegram. I remember [44] you telling Mr. Kover and I that the money would be here.

Q. And do you remember that on that occasion Mr. Kover said that he would not wait any longer?

A. No, I don't recall it.

Q. That he was going to foreclose immediately?

A. No.

Q. And that we had quite an extensive discussion there? A. I don't recall that.

Q. You don't recall that discussion at all?

A. No, I do not, not those words.

Q. What is that? A. Not those words.

Q. Well, do you recall anything about it?

A. No, not on the foreclosure.

Q. Well, what do you recall about it.

A. Nothing, no conversation that you had there with him.

Q. You cannot recall anything that passed between Mr. Kover and myself on that occasion?

(Testimony of F. M. Helsley.)

A. I do not.

Q. You would not be able to say, then, that on that occasion Mr. Kover did not threaten to foreclose?

A. No, sir.

Q. When was the first, then, that you learned that Mr. Cole would not complete this deal? On what day and date?

A. It was either Friday evening or Saturday morning, I cannot recall just which.

Q. Friday or Saturday? A. Yes.

Q. Who informed you? A. You did.

Q. I did?

A. Yes, sir. I say you—either you or Mr. Smith, I would not [45] say positively.

Q. You don't remember which one it was?

A. I would not say positively, no.

Q. And do you recall the reason?

A. No, I do not.

Q. You don't remember what reason was assigned for not completing the deal?

A. Anything more than Mr. Cole would not put up the money.

Q. Don't you remember that it was myself that told you?

A. I could not recall whether it was you or Mr. Smith.

Q. Don't you remember that I showed you a telegram from Mr. Cole?

A. You never showed me a telegram.

Q. I never showed you a telegram? A. No, sir.

Q. However, this, you say, was on the evening of

(Testimony of F. M. Helsley.)

Friday or the morning of Saturday?

A. No, the afternoon of either Friday or Saturday.

Q. That would be the 20th or 21st? A. Yes.

Q. And that was the first information you had that Mr. Cole would not execute the written instrument? A. Yes, sir.

Q. And did I understand you to say no reason was assigned for his refusal?

A. I did not hear any reason.

Q. How is that?

A. I don't remember of you stating any reason at that time.

Q. Did I at any time? A. Not to me, no.

Q. Shortly after this, Mr. Jesseph, as attorney for the Waterhouse-Sands Motor Company, started a foreclosure proceeding [46] to foreclose a chattel mortgage, did he not? A. He did.

Mr. JESSEPH.—Objected to as not proper cross-examination, and move to strike.

The COURT.—I don't see the materiality of that exactly.

Mr. CAREY.—It is material, your Honor, bearing upon the question of delivery.

The COURT.—He may answer.

Q. Now, you were served with notice in that case, were you not? A. Yes, sir.

The COURT.—When was this?

Mr. CAREY.—I was just going to identify it. I now hand you a document and ask you if this is a

(Testimony of F. M. Helsley.)

copy of the foreclosure notice that was served upon you.

A. Yes, sir.

Q. Did you defend that action?

A. Did I defend it?

Q. Yes. A. No.

Mr. JESSEPH.—I object to it as not proper cross-examination and incompetent, irrelevant and immaterial.

The COURT.—I think this is getting outside the direct examination pretty far.

Mr. CAREY.—No, your Honor. This witness has undertaken to give testimony concerning the delivery of these contracts.

The COURT.—What is the date of this notice?

Mr. CAREY.—This is July 21st.

The COURT.—He claimed he made delivery two or three weeks before that. I don't see what the foreclosure proceedings would have to do with this.

Mr. CAREY.—Well, I am trying to show what the facts are.

Mr. JESSEPH.—If your Honor please, nobody has had anything [47] to do with the preparation of that notice that could bind anybody to this suit. I might have made your Honor or Mr. Helsley parties to this foreclosure, and it would not be binding to anybody. Because I made Mr. Helsley a party to the foreclosure does not signify that Mr. Helsley owned the trucks.

Mr. CAREY.—He has testified that that is the

(Testimony of F. M. Helsley.)
amount due them under the contract of Waterhouse-Sands Motor Company.

The COURT.—And he testified he surrendered possession of them to these parties some time in—

Mr. JESSEPH.—On the 14th of July.

The COURT.—On the 14th of July, immediately after the negotiations of Saturday.

Mr. JESSEPH.—I am undertaking to show, your honor, that the sheriff took them from people who were holding them for him on the 21st.

The COURT.—Unless you expect to prove something beyond the adverse claims of a third party, I will have to sustain the objection.

Mr. CAREY.—Well, perhaps I had better pass to something else first, then.

Q. When you came to Spokane for the purpose of conducting these negotiations with Mr. Cole, on the 13th, I assume you left Valley the day before, did you? A. I did not.

Q. When did you leave Valley?

A. On the morning of the 13th.

Q. And got down here about noon?

A. No, sir.

Q. What time?

A. Must have been here about nine or ten o'clock.

Q. And you saw Mr. Cole in the Spokane & Eastern Trust Company before the close of banking hours that day? [48] A. Yes, sir.

Q. You had been operating under this contract (exhibit 1), up to that time, had you not?

A. Yes, sir.

(Testimony of F. M. Helsley.)

Q. How many men did you have employed?

A. Thirteen.

Q. Who was your foreman while you were operating?

A. I had two foremen, a day and night foreman.

Q. Who were they?

A. Steven Bunyard and Moore.

Q. Who? A. E. J. Bunyard.

Q. He had been employed by you as foreman for how long?

A. I don't recall the day I put him to work.

Q. Well, about how long?

The COURT.—About how many months or weeks?

A. Well, I should think about six weeks.

Q. About six weeks?

A. Something like that, I didn't know positively.

Q. Prior to July 14th? A. Yes.

Q. And when you left Valley to come down here to see Mr. Cole, you left the trucks in charge or under the direction of this man who had been your foreman for about six weeks before?

A. The trucks were not working.

Q. I didn't ask you that, but I say you left the trucks in charge of this man who had been your foreman while they were working.

A. I don't recall leaving anyone in charge.

Q. You just went away and walked off away from $20,000 worth of property, and did not leave anybody in charge of it?

(Testimony of F. M. Helsley.)

Mr. JESSEPH.—I object to that question as argumentative, if [49] your Honor please.

The COURT.—Yes.

Q. What did you do with the trucks?

A. They were there in the town of Valley.

Q. They had been in your charge up to the time you took the train? A. Yes, sir.

Q. And you say you left nobody in charge of them? A. No, sir.

Q. Did you ever go back? A. Yes, sir.

Q. Were you back there on the 14th?

A. Yes, sir.

Q. Did you come away from there again on the 14th? A. No, sir.

Q. When did you come away again?

A. On Wednesday morning, the 18th.

Q. Wednesday morning, the 18th?

A. I think so, yes.

Q. And were the trucks working then?

A. They were.

Q. Under whose direction?

A. Under the American Mineral Production Company.

Q. Who was in charge?

A. Mr. Bunyard, as foreman.

Q. When had he left your employ?

A. On the 13th day of July.

Q. On the 13th day of July?

A. On the first day of July. The company assumed the indebtedness and paid all bills and all labor from the first day of July on.

(Testimony of F. M. Helsley.)

Q. When did they assume it? [50]

A. On the 13th day of July, on Saturday.

Q. Well, you say you did not have any negotiations with Mr. Cole until the 13th?

A. The 13th, that was the day.

Q. You mean to say then that Mr. Cole simply agreed to assume past indebtedness?

A. He did.

Q. Is that it? A. He did.

Q. But the trucks were being actually worked by you, and the indebtedness was incurred by you yourself? A. Yes, sir.

Q. Up to and including the 13th? A. Yes, sir.

Q. And when you went away on the 13th the trucks were still left just in the same situation that they were at the time that they were operated by you prior to the 13th, were they not?

A. They were there in Valley, yes.

Q. I say, they were just exactly in the same situation as they were prior to the 13th when they were being operated by you, in the same place, under the same control? A. Yes, sir.

Q. And that likewise was true when you came down here on the 18th? A. No, sir.

Q. Well, what had happened between the 13th and the 18th?

A. The company had taken the operating of the trucks. I turned my key to the oil house over to them, and they put their own men in charge of them.

Q. You say the company had taken charge of them? A. Yes, sir.

(Testimony of F. M. Helsley.)

Q. When was that? [51]

A. On Monday, the following Monday after the 13th.

Q. That would be the 15th? As that was in anticipation of the execution of the contract that you came down here to Spokane to execute, was it not?

Mr. JESSEPH.—I object to that. It calls for a conclusion, and is argumentative.

The COURT.—You can ask him the circumstances under which they took possession, if they did.

Q. Well, whatever was done, on Monday the 15th, was done in anticipation of the execution of this written contract that you came down to prepare, was it not?

Mr. JESSEPH.—I object to that, if your Honor please. That is not a fair question, that it was done in anticipation of anything, also a conclusion, and does not call for the facts.

The COURT.—He can state the circumstances under which it was taken over.

A. There was no anticipation on my part. I considered the deal closed.

Q. You knew that you were coming down here to Spokane to execute a written contract, didn't you?

A. I knew I was coming down to get my money, or tried to.

Q. And you expected that this contract would be reduced to writing, didn't you? A. I did.

Q. And you came up to my office for that purpose?

A. I did.

Q. And when you left there on the 15th, Monday

(Testimony of F. M. Helsley.)

the 15th, you expected at that time that the sale would be completed?

A. I did not leave Valley on the 14th.

Q. I say on the 15th?

A. On the 15th. I left Valley Wednesday morning, the 18th. [52]

Q. Were you in Valley from the 13th to the 18th?

A. No, sir.

Q. Well, where were you between the 13th and the 18th?

A. I was at Deer Lake fishing most of the time.

Q. When did you go there? When did you go fishing, on what day? A. Most every day.

Q. Where is Deer Lake, then?

A. About nine miles from Valley.

Q. When did you leave Valley for Deer Lake?

A. I don't remember the hour.

Q. What day?

A. Well, I went Monday and Tuesday, two days.

The COURT.—You were back at Valley at night, were you? A. Yes, sir.

Q. And what officers of the company, if any, did you talk to on Monday and Tuesday?

A. Mr. Brunt and Mr. Smith.

Q. Mr. Brunt and Mr. Smith? A. T. P. Smith.

Q. Mr. Smith is a bookkeeper?

A. An accountant, yes.

Q. And then you came down here on Wednesday, didn't you, with Mr. Smith? A. Yes, sir.

Q. You suspended fishing operations for that day?

A. I did.

(Testimony of F. M. Helsley.)

Q. What conversation did you have with Mr. Brunt? A. Mr. Brunt wanted me to—

Q. Just a minute. On Monday the 15th, or Tuesday the 16th?

A. On the 15th, on Monday, Mr. Brunt wanted me to take charge of the equipment on a salary, and run it for them and I would not [53] consider it. He asked me if I could recommend anyone, and I told him yes that I could; I recommended Mr. Bunyard.

Q. That is the same man who had been your foreman for some six weeks before? A. Yes.

Q. And whose salary from the first of July was to be assumed by the Mineral Company, if the contract of purchase went through? A. Yes, sir.

Q. You did not discharge Mr. Bunyard?

A. I did not.

Q. You simply expected the Mineral Company to take him over along with the plant?

A. I did not.

Q. Well, you recommended that they do it?

A. I did.

Q. And this was on Monday the 15th?

A. The 15th.

Q. And you say at that time Mr. Brunt had some conversation with you about you personally continuing to run the trucks for the company after the purchase was completed? A. Yes, sir.

Q. But you did not come to any agreement as to that? A. I did not.

Q. Is that the only conversation you had with Mr. Brunt on that day?

(Testimony of F. M. Helsley.)

A. I don't recall whether it was or not. I remember that conversation that I had with him.

Q. Where was this conversation?

A. Right near their office at Valley.

Q. And did you have any conversation with him on the next day before you went fishing?

A. I don't recall it. [54]

Q. You were out of town all day the next day, were you? A. Not all day, no.

Q. That in substance is the only conversation you had with Mr. Brunt about the matter, is it, on those days? A. I think so, yes.

Q. Now, where were the trucks at this time?

A. Oh, they were there in Valley. They were working, and up and down the road. They were all over between the town and the quarries.

Q. They were working at this time, were they?

A. Yes.

Q. Under the direction of Mr. Bunyard?

A. After Monday, yes. On Monday he took charge.

Q. Where was Mr. Smith at this time, on Monday and Tuesday, the 15th and 16th? A. In Valley.

Q. What was he doing?

A. I could not tell you.

Q. You did not have any talk with him then?

A. Yes, sir.

Q. About what?

A. Why, I had no talk with Mr. Smith. That was in the presence of Mr. Smith.

Q. How is that?

(Testimony of F. M. Helsley.)

A. Mr. Brunt and I had the conversation regarding Mr. Bunyard taking charge of the equipment, in the presence of Mr. Smith.

Q. And that is all the negotiations you had with Mr. Smith on those two days? A. I think so.

Q. What had you done on Sunday the 14th, if anything, in connection with this deal?

A. I don't recall what I did on Sunday. **[55]**

Q. You were not fishing that day, were you?

A. It is hard to tell.

Mr. CAREY.—We offer this unsigned contract in evidence as an exhibit.

Thereupon said contract admitted in evidence and marked Defendant's Exhibit 3.

Redirect Examination.

(By Mr. JESSEPH.)

Q. Mr. Helsley, did the American Mineral Production Company ever pay you any money for hauling these trucks, after the Saturday upon which these negotiations took place as you have testified to?

Mr. CAREY.—Objected to as immaterial.

The COURT.—He may answer.

A. No, they never paid me any money.

Q. Do you know a man by the name of Moore who operated or worked for this company at Valley?

A. I do.

Q. Did he ever have anything to do with these trucks? A. Yes, sir.

Q. When did he get into this truck business?

(Testimony of F. M. Helsley.)

A. Either Monday afternoon or Tuesday morning, the 15th or 16th.

Q. What did he do?

A. He had charge of transportation.

Q. By whom was he employed?

A. By Smith and Brunt.

The COURT.—That is by the company, you mean?

A. Yes, Mr. Brunt and Mr. T. P. Smith.

Q. And what position did he occupy with reference to the job that the company had given to Mr. Bunyard? [56]

A. Mr. Moore was put over Mr. Bunyard, as I understood it.

Q. Did you have anything to do with the employing of Mr. Moore? A. I did not.

Q. Mr. Kover was the credit man of the Waterhouse-Sands Motor Company, wasn't he?

A. Yes, sir.

Q. When you were talking about the unpaid bills in these negotiations, what did you say to Mr. Cole and Mr. Smith about them?

A. Well, I gave Mr. Cole and Mr. Smith the unpaid bills, as near as I could, from recollection. I had none of the statements with me. I did not have my contract with the Waterhouse-Sands Company, and that was partly guesswork, outside of the Firestone Rubber Company.

Q. Did they understand you were giving it the best you could from recollection? A. They did.

The COURT.—He has already testified to it in

(Testimony of F. M. Helsley.)

his direct examination, and also on the cross-examination.

Recross-examination.

(By Mr. CAREY.)

Q. What did Mr. Moore do on the 15th?

A. I could not tell you.

Q. He didn't do anything, so far as you know?

A. I seen him around down there quite busy. I don't know what he was doing.

Q. He did not do anything on the 4th either, so far as you know?

A. I don't know, I am sure.

Q. With reference to these trucks? [57]

A. I don't know.

Q. Nor on the 16th?

A. The 15th, I think the afternoon of the 15th, he was put in charge of transportation.

Q. Now, you say you think. What do you know about it, of your own knowledge?

A. I know that either on the 15th or 16th he was put in charge of transportation.

Q. What do you mean by put in charge of transportation?

A. The moving of magnesite and calcite and supplies.

Q. That is, he was directing the method in which it should be hauled from the mine to the car for the company, is that it?

A. As I understand it, yes.

Q. And you had always been under the direction of somebody, had you not, while you were hauling?

(Testimony of F. M. Helsley.)

A. No.

Q. Didn't anybody connected with the company have anything to say as to when or how you should perform the work under this contract?

A. Why, Mr. Smires, I think, was the only man that ever opened his head to me.

Q. So that the introduction of Mr. Moore in the matter was that Mr. Moore simply took over the function that Mr. Smires had been performing before? A. No, sir.

Q. Well, just exactly what did Mr. Moore do on the 14th or 16th, whenever it was?

A. Well, he was put in charge of the moving of calcite and magnesite.

Q. Were you there at that time?

A. I was around Valley, yes.

Q. What were you doing? [58]

A. I was doing nothing.

Q. How did you happen to know about Mr. Moore?

A. Mr. Brunt told me, and so did Mr. Bunyard.

Q. Did they tell you what he did?

A. He was superintendent. He had charge of moving all of the supplies, magnesite and calcite.

Q. Well, somebody had been doing that for the company before, hadn't they?

A. I had been doing it, yes.

Q. Well, you were doing—you had been doing the hauling?

A. There was no one dictating to me.

Q. Do you mean you were acting as a contractor

(Testimony of F. M. Helsley.)
hauling magnesite and also acting as your own superintendent? A. I was.

Q. Anyway after that time they put a superintendent in charge instead of allowing the contractor to do it himself, is that correct?

A. No, sir, they had charge of the equipment. They were doing the hauling. I had nothing to do with it.

Q. And Mr. Moore, you say, is the man who had charge of it at that time, namely on the 15th and 16th, for the company?

A. The 15th and 16th he was put in charge, yes.

Q. And you don't know of anybody else that was in charge except him? A. Mr. Bunyard.

(Witness excused.)

Thereupon an adjournment was taken until 10:00 A. M., Wednesday, April 24th, 1918, and the Court thereafter duly convened, whereupon the following proceedings were had:

F. M. HELSLEY, recalled, testified as follows:

Cross-examination.

(By Mr. CAREY.) [59]

Q. Mr. Helsley, you stated yesterday that these negotiations with C. R. Cole at the Spokane & Eastern Trust Company were on Saturday, July 13th, did you not?

A. Something near that date. I don't know positively.

Q. I have a calendar here that shows Saturday the middle of July was the 14th? A. It might be.

Q. So that I think we ought to have the record show that Saturday was the 14th and Sunday the

(Testimony of J. E. Bunyard.)

15th and Monday the 16th, and Tuesday the 17th and Wednesday the 18th, instead of as it is.

The COURT.—I suppose the calendar will show all of these things.

Mr. CAREY.—I would like to have it shown by the testimony rather than the calendar.

(Witness excused.)

Testimony of J. E. Bunyard, for Plaintiff.

J. E. BUNYARD, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. JESSEPH.)

Q. Your name is E. J. Bunyard?

A. J. E. Bunyard.

Q. You live in the city of Spokane at this time?

A. Yes, sir.

Q. What is your business, Mr. Bunyard?

A. I haven't any right now.

Q. Are you working?

A. No, not at present.

Q. Are you acquainted with Mr. Helsley, the plaintiff in this case? A. Yes, sir.

Q. Where did you know him?

A. I met him at Valley. [60]

Q. Are you acquainted with the American Mineral Production Company that is operating at Valley? A. Yes, sir.

Q. Do you know Mr. C. R. Cole?

A. I have met him, is all.

(Testimony of J. E. Bunyard.)

Q. And Mr. H. H. Brunt? A. Yes, sir.

Q. Mr. T. P. Smith? A. Yes, sir.

Q. Did you ever work for the American Mineral Production Company? A. Yes, sir.

Q. When did you first go to Valley?

A. On the 20th day of last May.

Q. Who were you employed for at that time?

A. Mr. Helsley.

Q. What was he doing there then?

A. Operating trucks, hauling magnesite.

Q. For whom?

A. The American Mineral Production Company.

Q. When did you go to work for the company?

A. The 15th of July.

Q. Who put you to work? A. H. H. Brunt.

Q. What doing?

A. Foreman of the trucks.

Q. What was said to you at that time, if anything, about the trucks?

A. Mr. Brunt informed me—

Q. By Mr. Brunt or Mr. Smith?

A. Mr. Brunt and Mr. Smith both informed me that they had taken over the trucks, and that I was to be their foreman. **[61]**

Q. Did they fix your wage? A. Yes, sir.

Q. Did you act for the company as foreman of the trucks? A. Yes, sir.

Q. What were your duties?

Mr. CAREY.—That is immaterial.

The COURT.—I don't know that. It is preliminary. He may answer.

(Testimony of J. E. Bunyard.)

A. Why, to see that the trucks were kept in operation, and check in the gas and oils and things like that.

Q. What trucks were these?

A. The trucks that Helsley formerly had.

Q. That had been run by him up there?

A. Yes, sir.

Q. You said, I believe, that you went to work on the 15th of July?

A. Yes, sir, that is the day I went to work for them.

Q. Were these trucks used by the American Mineral Production Company in its business?

A. Certainly.

Q. What did they do with the trucks?

A. Well, they hauled oil to the mine and hauled ore from one mine to another, and then hauled calcine back to Valley.

Q. Did you know of Mr. Helsley having some gasoline and motor oil up at Valley? A. Yes, sir.

Q. At the time the trucks were turned over?

A. Yes, sir.

Mr. CAREY.—That is immaterial.

Mr. JESSEPH.—It is only a circumstance.

The COURT.—It is a circumstance. Proceed.

Q. What became of that? [62]

A. Why, it was used by the American Mineral Company.

Q. By the American Mineral Production Company? A. Yes, sir.

Q. In operating the trucks? A. Yes, sir.

(Testimony of J. E. Bunyard.)

Q. Who paid you for the labor that you did there as foreman on the trucks?

A. The American Mineral Production Company.

Q. For what period of time did they pay you, Mr. Bunyard? A. From the first day of July.

Q. To what date?

A. To the 21st, I believe it was.

Q. Who drove the trucks during this time?

A. Well, they had the same bunch of boys that Mr. Helsley had.

Q. Who put them to work? A. I did.

Q. Did you have any directions from anyone as to getting them to operate trucks? A. Yes, sir.

Q. From whom?

A. Mr. Brunt and Mr. Moore.

Q. Who was Mr. Moore?

A. He was transportation man, I guess you would call him.

Q. Was he your immediate superior officer there or your boss? A. He was, sir.

Q. Who paid these men that drove the trucks?

A. The American Mineral Production Company.

Q. For what period of time?

A. From the first day of July.

Q. To the 21st? A. Yes, sir. [63]

Q. Did Mr. Helsley have anything to do with the running of these trucks after you were employed as foreman? A. No, sir.

Q. Did he ever pay you anything for labor you performed between the first day of July and the 21st? A. No, sir.

(Testimony of J. E. Bunyard.)

Cross-examination.

(By Mr. CAREY.)

Q. How long have you known Mr. Helsley before you went to work for him on May 20th?

A. I think I met him on the 19th.

Q. And went to work for him the next day?

A. Yes, sir.

Q. As foreman?

A. Not foreman at first, no.

Q. When did you become foreman?

A. Oh, I guess about two or three weeks after I went to work for him.

Q. And you continued to be his foreman up to July 15th? A. Yes, sir.

Q. However, when it came to get your pay for the work you did from July 1st to the 15th, you got that pay from the American Mineral Production Company? A. Yes, sir.

Q. And then it was also paid from the 15th to the 21st by the American Mineral Production Company?

A. Yes, sir.

Q. You say that you met Mr. C. R. Cole once?

A. Just met him there in Valley, yes, sir.

Q. You did not have any conversation with him?

A. None whatever.

Q. You were simply in town there and the employees knew that [64] he was president of the company?

A. Knew that he was connected with the company in some way.

Q. Your meeting with Mr. Cole was purely casual?

(Testimony of J. E. Bunyard.)

A. Yes, sir.

Q. You never did anything concerning the trucks at his direction? A. No, sir.

Q. Nor were you ever paid by him for any labor performed upon the trucks?

A. Paid by the company.

Q. That is what I say, you were paid by the American Mineral Production Company, and not by Mr. Cole. A. Yes, sir.

Q. When did you leave the employ of the company? A. Last Wednesday.

Q. How long have you seen Mr. Helsley between the time you ceased to work for him on July 15th and the time you quit the employ of the company last Wednesday?

A. Oh, possibly I met him two or three times; saw him going through town, or something like that.

Q. When did you meet him?

A. I could not just recall the date. I met him along in the winter, and along this spring some time.

Q. How long prior to the time that you left the company was the last time?

A. The last time I met him was—oh, I guess it must have been about a month ago.

Q. Have you communicated by letter? A. No.

Q. About this time that you ceased to work for Mr. Helsley and went to work for the American Mineral Production Company, on July 15th, the feeling between you and Mr. Helsley was not [65] particularly friendly, was it?

A. Why, we were not enemies by any means.

(Testimony of J. E. Bunyard.)

Q. How is that?

A. We were not enemies by any means.

Q. I say your feeling was not friendly?

A. Yes, it was.

Q. Don't you remember of having expressed yourself very forcibly concerning Mr. Helsley along about this time?

Mr. JESSEPH.—I object to that as incompetent, irrelevant and immaterial, and not proper cross-examination.

Mr. CAREY.—It tends to show the interest of the witness.

The COURT.—His feeling would not show his interest.

Mr. CAREY.—I expect to show his interest, yes.

The COURT.—Very well, proceed, then.

A. No, I don't think I made any assertions.

Q. You recall during the period when the situation up there seemed to be in rather an unsettled state, and you men did not know where the money was coming from, that a Mr. Davis went up to arrange to have you paid? A. Yes, sir.

Q. You remember Mr. Davis? A. Yes, sir.

Q. And isn't it a fact that upon that occasion that you criticised Mr. Helsley very forcibly to Mr. Davis?

Mr. JESSEPH.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—I don't see the materiality of that. It might be very material from the standpoint of the plaintiffs, if he had testified against them.

(Testimony of J. E. Bunyard.)

Mr. CAREY.—Well, I expect to show it is material very shortly. [66]

The COURT.—You had better come to the materiality first, then.

Mr. CAREY.—I don't care to explain it in the presence of the witness.

The COURT.—Proceed, then.

Q. Will you answer the question?

A. I don't recall making any rank assertions to Mr. Davis.

Q. Isn't it a fact you left the employ of the company a few days ago at the suggestion of Mr. Helsley to come down and testify in this case?

A. I did not, sir.

Q. You did not? A. No, sir.

(Witness excused.)

Testimony of J. D. Kulzer, for Plaintiff.

J. D. KULZER, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. JESSEPH.)

Q. Your name is J. D. Kulzer? A. Yes.

Q. You live in the town of Valley, do you, Mr. Kulzer? A. Yes, sir.

Q. In Stevens County? Yes, sir.

Q. Have lived there for a number of years?

A. Yes, sir.

Q. Engaged in the sawmill business there?

A. Yes, sir.

(Testimony of J. D. Kulzer.)

Q. And have been for some time past?

A. Yes, sir.

Q. Do you know Mr. Helsley, the plaintiff in this case? A. Yes, sir. [67]

Q. Do you know the American Mineral Production Company and its officers and men at Valley?

A. Yes, sir.

Q. And Mr. Cole, who is president of the company? A. Yes, sir.

Q. How long have you been acquainted with these people?

A. Well, ever since they came there.

Q. Did you have some dealings with the American Mineral Production Company through its officers at Valley in 1917? A. Yes, sir.

Q. With reference to a bill that had been owing to you by Mr. Helsley? A. Yes, sir.

Q. What was done with that bill?

A. Why, before I knew anything about the transaction that occurred between Mr. Helsley and the Mineral Production Company, I had a bill for lumber against Helsley & Company, and one day I met Mr. Helsley in Valley and I said, "Mr. Helsley, I would like that money."

Mr. CAREY.—I object to any conversation between Mr. Helsley and the witness.

The COURT.—Sustain the objection.

Q. Just tell what you did with reference to dealing with the company. You need not detail the circumstances that lead up to it.

(Testimony of J. D. Kulzer.)

A. I wanted the bill paid and he says the bill was—

The COURT.—Never mind, now. You were dealing with the company and its officers. Never mind Mr. Helsley.

A. Oh, the Mineral Production Company?

Mr. JESSEPH.—Yes.

A. I went to Mr. Helsley and asked him if he had assumed—

Mr. CAREY.—I object to any conversation between Mr. Smith **[68]** and the witness for the reason that no authority of Mr. Smith to act for the American Mineral Production Company is shown.

The COURT.—Sustain the objection, until some authority is shown.

Mr. JESSEPH.—Well, the testimony yesterday was that Mr. Cole, who is admitted, as I understand the facts, to be the president of this company, told Mr. Smith to take over the trucks and gather up these bills, when they appeared at the Spokane & Eastern Trust Company after the deal was closed. Mr. Helsley testified to that himself, as I understand the testimony.

Mr. CAREY.—The evidence on that is that Mr. Smith on that special occasion was acting under special instructions from Mr. Cole as an individual, and not acting on behalf of the company.

Mr. JESSEPH.—There isn't any evidence here that shows he was acting under Mr. Cole as an individual. Mr. Cole was president of the company at that time, and previous to that time.

(Testimony of J. D. Kulzer.)

The COURT.—The trouble is you are suing him here. You are suing the president, and you are suing the company. Now do you claim that this plaintiff was agent for both of them or agent for only one.

Mr. JESSEPH.—If your Honor please, those facts are all in the possession of the other side, and we are, of course, bound by whatever the facts are.

The COURT.—I will let the testimony go in, because it would be binding on the defendant Cole in any event.

Mr. CAREY.—We would like an exception to the Court's ruling.

The COURT.—Yes. State your conversation with Smith.

A. I asked Mr. Smith if they had bought out Helsley and Company and he says, "Yes, sir, we have."

Mr. CAREY.—If who had bought out Helsley & Company?

A. The American Mineral Production Company, and he says, "We have." [69]

Mr. CAREY.—I move to strike the answer for the reason that any statements made by Mr. Smith concerning the American Mineral Production Company is not binding upon that company, and any conversation he had with this witness concerning—

The COURT.—Any conversation you had in regard to the payment of the bill will be admitted, but he can't make any statements binding on the company until his authority is shown.

(Testimony of J. D. Kulzer.)

Q. What was done about the bill? Was it paid by the company?

A. I had to file a lien—after a while they refused to pay it. First they promised to pay it, and they refused to pay it after they got into some controversy, and then I had to file a lien against the property, and found that the—

Mr. CAREY.—Against what property?

The COURT.—The question is was the bill paid.

A. The bill was paid, yes, sir.

Mr. JESSEPH. Q. Who paid it? Whose property did you get that paid it?

A. I got the property there that was taken over there by the Mineral Production Company.

Mr. JESSEPH.—That is all.

Mr. CAREY.—No cross-examination.

(Witness excused.)

Mr. JESSEPH.—Plaintiff rests.

Mr. RUSSELL.—I would like to make a motion at this time, if your Honor pleases.

The COURT.—On what ground?

Mr. RUSSELL.—Well, first we make a motion separately for each defendant. I will first make a motion on behalf of C. R. Cole. I challenge the sufficiency of the evidence and move for a judgment for the defendant on behalf of C. R. Cole, for the reason that the contract that is pleaded in this complaint has not been proven. That whatever evidence there is to show that **[70]** there was a contract between Mr. Cole and the plaintiff comes within the statute of frauds, is not enforceable; and

that the evidence clearly shows that the contract never was reduced to writing is admitted by the parties, and they have wholly failed to establish the claim against C. R. Cole. There was no delivery to C. R. Cole, according to the evidence as it now stands. On behalf of the American Mineral Production Company I make the same motion, the same challenge and motion for the reason that there is no evidence to show that there was any contract between Mr. Helsley and the American Mineral Production Company; and if there was a contract, the contract that is proved here is not the contract that is pleaded. The contract proven is the contract that Mr. Helsley was selling out his partnership interest, which the American Mineral Production Company, as a corporation, was not authorized to buy; a corporation under the laws of this State not being permitted to enter into a copartnership. It is pleaded and admitted here that the defendant corporation was a South Dakota corporation, but we must assume that the laws of this State in respect to the rights of corporations and powers of corporations by the laws in South Dakota are the same as in this State, unless shown to be different.

(Argument by Mr. Russell. Jury retires.)

The COURT.—At the outset I am at a loss to know upon what theory here the plaintiff claims that there was a joint purchase by Cole in this corporation. There is not an intimation in the testimony on the part of the plaintiff that Cole was acting in-

dividually and as an officer at the same time. He was acting either one way or the other, and it seems to me that the testimony does not justify any other influence.

Mr. JESSEPH.—Of course I do not agree with Mr. Russell about what the testimony shows. I think it shows that Mr. Helsley did testify he was dealing with Mr. Cole as president [71] of this company, and that he sold his interest to the American Mineral Production Company. That is his testimony.

The COURT.—Then he would have no cause of action against Cole.

Mr. JESSEPH.—If your Honor please, it is hard for me to say whether there is or not. At the time this action was commenced you can plainly see that I did not know who was who or how they were going to get at it. In other words, I started it both ways. Now, if I have proven a cause of action against the company, good and well. If I have not proven one against Mr. Cole, good and well. Mr. Helsley, of course, has testified that he was dealing with the corporation. He sold his interest to the company—

The COURT.—I will grant the motion for a nonsuit as to Cole.

Mr. RUSSELL.—Now, in respect to the American Mineral Production Company, it seems to me that the evidence here shows that they had no contract with the American Mineral Production Company. It was clearly contemplated that they would reduce all of these negotiations into writing.

The COURT.—There are some written negotia-

tions afterwards, but the plaintiff here testified exclusively that he agreed to sell whatever interest he had in his trucks to this corporation for $5,500; that they agreed to pay him the sum of $5,500 on the following Wednesday, and that the trucks were turned over to the company, and that he delivered the possession which complied with the statute of frauds. That is, the jury is warranted in finding the fact.

Mr. CAREY.—Your Honor has overlooked what Mr. Helsley testified with respect to the written contract which was prepared, which shows very explicitly that the contract or negotiations for a contract between Helsley and Cole was not made with Cole on behalf of the American Mineral Production Company, and there is no pretense that he had any negotiations looking for a contract with anybody else. The contract here which your Honor will [72] remember Mr. Helsley read and admitted, that it represented—

The COURT.—The negotiations that the parties had at that time.

Mr. CAREY.—And there were no other negotiations with anybody concerning the company looking to the fixing of a purchase price between Helsley and the company.

The COURT.—You can't take any inconsistent positions, any more than the plaintiff can. If you claim that Cole was acting in his individual capacity at the time these negotiations were had, I will set aside the order of dismissal as to him, and grant it as to the company.

Mr. CAREY.—And grant it as to the company?

The COURT.—Yes. You have taken one position or the other. Cole was representing the corporation, or he was representing himself.

Mr. CAREY.—I think that is the correct position to take, if your Honor please, that the admitted contract was made between Helsley and Cole and not between Helsley and the company.

Mr. JESSEPH.—What are you going to do with Helsley's testimony? He has testified positively that he dealt with the corporation.

Mr. CAREY.—That is based on Helsley's testimony when he testifies—

The COURT.—This contract you have here is a subsequent transaction entirely to the contract which he testified to in his direct examination. He testified to a full and complete contract of sale and delivery, and then you brought out certain negotiations which took place afterwards. Whether that would be inconsistent with his previous testimony or not is a question for the jury, and not for the Court.

(Argument by counsel.)

The COURT.—I will overrule the motion of nonsuit as to the [73] company and grant it as to Cole, because I don't think there is anything in Helsley's testimony that would warrant a judgment against Cole for a verdict.

Mr. CAREY.—We take exception to the Court's ruling so far as he refused a nonsuit as to the company.

(Jury returns into court.)

The COURT.—The motion for a nonsuit has been granted as to the defendant Cole, so you will be only concerned with the case against the company.

Mr. RUSSELL.—These are the interrogatories propounded to and made by Mr. C. R. Cole:

Interrogatories and Answers Propounded to and Made by C. R. Cole.

Interrogatory No. 1. State your name and place of residence.

A. Charles R. Cole, Chicago, Illinois.

No. 2. Are you the C. R. Cole named as the defendant in the above-entitled case? A. I am.

No. 3. Were in Spokane, Washington, in July, 1917? A. I was.

Interrogatory No. 4. Did you meet the plaintiff, Mr. F. M. Helsley, in July, 1917? A. I did.

Interrogatory No. 5. If you state that you did meet Mr. Helsley in July, 1917, state where and when you met Mr. Helsley.

A. It was on a Saturday forenoon in the Davenport Hotel and later at the Spokane and Eastern Trust Company. I think it was July 14th.

Interrogatory No. 6. State what office, if any, you held with the American Mineral Production Company in July, 1917?

A. I was president of the company.

Interrogatory No. 7. State whether or not you, as an individual, had any dealings with Mr. F. M. Helsley about the motor trucks, or any of them mentioned in the amended complaint [74] in this action? A. Yes.

Interrogatory No. 8. If you answer the foregoing in the affirmative, state what those dealings were and where had.

A. When I reached the west the latter part of June I discovered that Mr. Smyers had bought out the interest in the Cashmere Truck Company belonging to one John Wilson and that he had bought same in my name and had signed the papers in my name by himself. That was the first intimation I had that I was a partner in the Cashmere Truck Company. The arrangement was very unsatisfactory to me. On Saturday, July 14, Mr. Helsley met me in Spokane for negotiations. I told him that Wilson's interest had been bought in my name without my knowledge or authority and that I was willing to quitclaim to Mr. Helsley all my interest in said Cashmere Truck Line and to lose the $5,500 that had been paid providing that he would quitclaim me from any claims on his part. Mr. Helsley represented to me that he could not accept such a proposition because he had no money and that there was $8,000 due in installment payments on the trucks which he could not pay. This was in the presence of Mr. T. P. Smith. Mr. Helsley further stated that there was sufficient amounts due the Cashmere Truck Line to pay all outstanding obligations except the $8,000. Mr. Helsley represented that he was about to pay, but offered to sell me his interest for $5,500, representing that said sum with the $5,500 already paid and the $8,000 due on the trucks would represent a total investment of $19,000 and that said trucks were in his estimation easily worth $24,000. Helsley

represented that there were no other obligations of any kind. Finally I agreed verbally to accept the proposition on those representations and instructed my attorneys Post, Russell, Carey & Higgins to draw up the papers in accordance with said understanding. I left the same day for Chicago. After my arrival in Chicago I was advised [75] by wire by Mr. T. P. Smith that there was $1,500 of obligations of the said Cashmere Truck Line over and above what was due said company on accounts receivable and furthermore that the company having a mortgage on the trucks claimed a balance of $10,600 and some odd dollars instead of $8,000 as represented by Mr. Helsley. I wired to the attorneys and to Mr. Smith to notify Mr. Helsley that I would only stand by the agreement and representations as made and that he must make good the extra $1,500 and $2,600 or the negotiations for the purchase of his interest would be declared off. Mr. Helsley refused to make good the difference and the negotiations were declared off.

Mr. JESSEPH.—I move to strike all of that answer with reference to any misrepresentations with reference to any fund or debt over and above those that he claimed and represented, because there is no issue in this case at all.

The COURT.—The answer will be permitted to stand so far as it is evidence of the negotiations the company had with reference to the sale. The other part is immaterial except in so far as it shows that a contract was actually made. Motion denied.

Mr. RUSSELL.—(Reading:) Interrogatory No.

9. State whether or not you, as an officer of the American Mineral Production Company, had any dealings with Mr. Helsley about the motor trucks or any of the motor trucks mentioned in the amended complaint in this action? A. I did not.

Interrogatory No. 10. If you answer the foregoing interrogatory in the affirmative, state what those dealings were and where had.

A. (Answered by 9.)

Interrogatory No. 11. State whether or not any memorandum in writing was made relative to the motor trucks mentioned in [76] the amended complaint, or any of them.

A. There was none.

Interrogatory No. 12. If you answer the foregoing interrogatory that there was a memorandum in writing, produce the memorandum and attach the same to your answers to these interrogatories and mark the same "Defendants' Exhibit 1."

A. (Answered by 11.)

Interrogatory No. 13. State whether or not you, as an individual, ever paid any money to F. M. Helsley on account of the purchase price of the motor trucks or any of the motor trucks mentioned in the amended complaint?

A. No.

Interrogatory No. 14. State whether or not you, as an individual, took possession of the motor trucks or any of said motor trucks mentioned in the complaint?

A. I did not.

Interrogatory No. 15. State whether or not you,

as an officer of the American Mineral Production Company, ever paid any money to the plaintiff on account of the motor trucks or any of the motor trucks mentioned in the amended complaint?

A. I did not.

Interrogatory No. 16. State whether or not you, as an officer of the American Mineral Production Company, ever made any memorandum relative to the motor trucks or any of the motor trucks mentioned in the amended complaint?

A. I did not.

Interrogatory No. 17. State whether or not you, as an officer of the American Mineral Production Company, ever took possession of the motor trucks or any of the motor trucks mentioned in the amended complaint?

A. I did not.

Interrogatory No. 18. State whether or not anyone was [77] authorized by the American Mineral Production Company to pay any money to the said plaintiff on account of motor trucks or any of the motor trucks mentioned in the amended complaint?

A. There was not.

Interrogatory No. 19. If you answer the foregoing interrogatory in the affirmative, state the name of said person.

A. (Answered by 18.)

Interrogatory No. 20. If you answer said interrogatory in the affirmative, state whether or not such person, if you know, ever paid any money to the said F. M. Helsley on account of the motor trucks

or any of the motor trucks mentioned in the amended complaint?

A. (Answered by 18.)

Interrogatory No. 21. State whether or not anyone was authorized by the American Mineral Production Company to take possession of the motor trucks or any of the motor trucks mentioned in the amended complaint for and on behalf of the American Mineral Production Company?

A. There was not.

Interrogatory No. 22. If you answer the foregoing interrogatory in the affirmative, state the name of the person so authorized.

A. (Answered by 21.)

Interrogatory No. 23. State if you know whether or not any person so authorized did take possession of the motor trucks or any of the motor trucks mentioned in the amended complaint for and on behalf of the American Mineral Production Company?

A. Not to my knowledge.

Interrogatory No. 24. State whether or not T. P. Smith was an officer or agent of the American Mineral Production Company in July, 1917?

A. He was an employee.

Interrogatory No. 25. If you answer that the said T. P. Smith [78] was an officer of the American Mineral Production Company in July, 1917, state what office he held with said company, or if he be an agent, state what authority he had to represent the American Mineral Production Company in connection with any negotiations relating

to the trucks or any of the trucks mentioned in the amended complaint.

A. He had no authority to represent the American Mineral Production Company in that connection.

Interrogatory No. 26. State whether or not you authorized anyone, for and on your behalf as an individual to pay any money to said F. M. Helsley for and on account of the motor trucks or any of the motor trucks mentioned in the amended complaint.

A. I authorized Post, Russell, Carey & Higgins to pay the $5,500 providing that the property was transferred as per agreement free from any obligations excepting the $8,000 mortgage on same as represented by said F. M. Helsley.

Interrogatory No. 27. State whether or not you authorized anyone, for and on your behalf as an individual to take possession of the motor trucks or any of the motor trucks mentioned in the amended complaint? A. I did not.

Interrogatory No. 28. If you answer that someone was authorized to pay any money for you as an individual on account of the said motor trucks or any of them, state his name.

A. Mr. Carey of the firm of Post, Russell, Carey & Higgins.

Interrogatory No. 29. If you state that anyone was authorized to take possession of the motor trucks or any of them for you as an individual, state his name. A. There was none.

Interrogatory No. 30. State in full all and any transactions you as an individual had with the said

F. M. Helsley relating to the motor trucks or any of the motor trucks mentioned in the [79] amended complaint.

A. That was answered in my answer to question 8.

Interrogatory No. 31. State in full all the transactions you as an officer of the American Mineral Production Company had with the said F. M. Helsley on account of the motor trucks or any of the motor trucks mentioned in the amended complaint.

A. I had none.

Interrogatory No. 32. Do you know H. W. Smyers? A. I do.

Interrogatory No. 33. State whether or not H. W. Smyers represented you in any transaction with F. M. Helsley relating to the motor trucks or any of the motor trucks mentioned in the amended complaint. A. No.

Interrogatory No. 34. If you say that H. W. Smyers did represent you, state in what way he was to represent you in any such transactions. Answer in full.

A. He was not to represent me. I knew nothing about it until it was all over.

Mr. RUSSELL.—I will now read the cross-interrogatories propounded to C. R. Cole. (Reading:)

Cross-Interrogatory No. 1. How long have you been acquainted with the plaintiff in this case?

A. I met him the first time in June, 1917.

Cross-Interrogatory No. 2. Where is the principal place of business of the American Mineral Production Company. A. Valley, Washington.

Cross-Interrogatory No. 3. Were you in 1917 ac-

quainted with the copartnership known as the Cashmere Truck Line? A. Yes.

Cross-Interrogatory No. 4. Were you acquainted with John Wilson, one of the copartners in this concern? [80] A. I was not.

Cross-Interrogatory No. 5. Who was the other copartner? A. F. M. Helsley.

Cross-Interrogatory No. 6. When, if you ever, did you purchase Wilson's interest in this concern?

A. The purchase was made in my name by H. W. Smyers without my knowledge and authority and I knew nothing until my arrival in Valley the latter part of June.

Cross-Interrogatory No. 7. What business was this concern carrying on in the summer of 1917?

A. Doing a general trucking business.

Cross-Interrogatory No. 8. Were you acquainted with the trucks and equipment owned and operated by this copartnership? A. I was not.

Cross-Interrogatory No. 9. When you purchased Wilson's interest in the truck line was it purchased for yourself or for the American Mineral Production Company?

A. It was purchased for myself by H. W. Smyers.

Cross-Interrogatory No. 10. In July, 1917, were you the president of the American Mineral Production Company? A. I was.

Cross-Interrogatory No. 11. In what business was the American Mineral Production Company engaged at that time and where was it operating?

A. Was engaged in mining and shipping magne-

site at its offices, being located at Valley, Washington.

Cross-Interrogatory No. 12. Did you not, in the business room of the Spokane & Eastern Trust Company, at Spokane, in July, 1917, purchase Helsley's interest in the trucks mentioned in the amended complaint in this action for the sum of $5,500?

A. I agreed to purchase his interest in the trucks at that price subject to a certain representation made by him which [81] afterward proved to be false.

Cross-Interrogatory No. 13. Were you acting for yourself at this time or for and on behalf of the American Mineral Production Company?

A. For myself.

Cross-Interrogatory No. 14. Where did you go after leaving Spokane on the 14th day of July, 1917?

A. Left immediately for Chicago.

Cross-Interrogatory No. 15. Were you at the town of Valley, in Stevens County, Washington, at any time in the month of July, 1917, after the 14th day of said month? A. I was not.

Cross-Interrogatory No. 16. Are you acquainted with one H. H. Brunt? A. I am.

Cross-Interrogatory No. 17. What official position did he hold with the American Mineral Production Company in July, 1917?

A. He was sales manager.

Cross-Interrogatory No. 18. Who operated the trucks mentioned in the amended complaint after the 14th day of July, 1917? A. I was not.

Cross-Interrogatory No. 19. Do you know a man

at Valley by the name of Bunyard? A. I was not.

Cross-Interrogatory No. 20. Was he not placed in charge of the trucks mentioned in the amended complaint by the American Mineral Production Company on or about the 14th day of July, 1917?

A. Not to my knowledge.

Cross-Interrogatory No. 21. Beginning on or about the 14th day of July, 1917, did not the American Mineral Production [82] Company employ and pay men to operate the trucks mentioned in the amended complaint for the defendant corporation?

A. Not to my knowledge.

Mr. RUSSELL.—I will read the interrogatories propounded to T. P. Smith and his answers. (Reading:)

Interrogatories and Answers Propounded to and Made by T. P. Smith.

Interrogatory No. 1. State your name and address.

A. Thomas Phoenix Smith; 4454 N. Racine Avenue, Chicago, Ill.

Interrogatory No. 2. Do you know F. M. Helsley?

A. Yes.

Interrogatory No. 3. Were you connected in any way with the American Mineral Production Company during the year 1917? A. Yes.

Interrogatory No. 4. State whether or not you had any transactions or any dealings with F. M. Helsley on account of the motor trucks or any of the motor trucks mentioned in the amended complaint in the above-entitled cause. A. Yes.

Interrogatory No. 5. If you state that you did have some dealings with said F. M. Helsley on account of the said motor trucks or any of them for and on behalf of the American Mineral Production Company, state in detail what these dealings were.

A. None.

Interrogatory No. 6. State whether or not you had any dealings with F. M. Helsley on account of the motor trucks or any of the motor trucks mentioned in the amended complaint for and on behalf of C. R. Cole? A. Yes.

Interrogatory No. 7. If you state that you did have dealings with the said F. M. Helsley on account of said motor trucks for and on behalf of C. R. Cole, state in detail what dealings you had with the said F. M. Helsley on that account.

A. I met Mr. Cole and Mr. Helsley at the Davenport Hotel, [83] Spokane, on July 14, 1917. Went to the Spokane and Eastern Trust Company Bank with Mr. Cole, Helsley and Mr. Cowan, Mr. Helsley's attorney. Mr. Cole there made a proposition to transfer his, Mr. Cole's interest in the Cashmere Truck Line to F. M. Helsley, but this offer was refused. Mr. Cole then told me to talk things over with Helsley and get his ideas. This I did. Helsley then offered to sell his interest to Mr. Cole for five and one-half thousand dollars, Mr. Cole taking over all liabilities which Helsley said were as follows: Due Waterhouse-Sands, $8,000—accounts payable five to six hundred dollars more. Mr. Cole and I discussed this at length and he told Helsley he would accept at the figures given, we taking line

as from 21st of July. Mr. Cole instructed me to see Mr. Carey to draw up the contract, as he was leaving for Chicago that same evening. If his train was on time at Chicago he would remit the money that day, namely Tuesday.

Interrogatory No. 8. State what position, if any, you had with the American Mineral Production Company in the year 1917, and particularly in July, 1917. A. I was chief clerk there.

Interrogatory No. 9. State whether or not you are authorized by the American Mineral Production Company to represent it in any transaction with F. M. Helsley on account of the motor trucks or any of the motor trucks mentioned in the amended complaint in the month of July, 1917.

A. No.

Mr. RUSSELL.—I will now read the cross-interrogatories. (Reading:)

Cross-Interrogatory No. 1. Were you the bookkeeper for the American Mineral Production Company in July, 1917?

A. Yes.

Cross-Interrogatory No. 2. Did you meet F. M. Helsley, the plaintiff in this action, in the city of Spokane in July, 1917? [84]

A. Yes.

Cross-Interrogatory No. 3. If you answer that you did, state where you met him and who was present?

A. Davenport Hotel, Spokane, the 14th of July. Present, Mr. C. R. Cole, Mr. Cowan, Mr. Helsley and myself.

Cross-Interrogatory No. 4. Are you acquainted with a Mr. Cowan who resides in the city of Spokane? A. Yes.

Cross-Interrogatory No. 5. Were you present in the business room of the Spokane and Eastern Trust Company in Spokane on or about July 14, 1917, when the negotiations for the sale of the trucks mentioned in the amended complaint to the American Mineral Production Company were closed?

A. No.

Cross-Interrogatory No. 6. If you answer the foregoing interrogatory in the affirmative, state what the consideration was for the sale of these trucks to the defendant corporation?

A. (Answered by 5.)

Cross-Interrogatory No. 7. Were you at the town of Valley in Stevens County, Washington, in July, 1917?

A. Yes.

Cross-Interrogatory No. 8. Who, if anyone, operated the trucks mentioned in the amended complaint after July 14, 1917?

A. They were not operated to my knowledge.

Cross-Interrogatory No. 9. Did the American Mineral Production Company employ any men to operate the trucks mentioned in the amended complaint after July 14, 1917?

A. No.

Cross-Interrogatory No. 10. Did you not, in a conversation with John Kulzer, at the office of the American Mineral Production Company at Valley on July 16, 1917, he and you only being present, in

substance say: The American Mineral Production Company has [85] purchased Helsley's interest in the trucks and will pay all outstanding bills?

A. No, I did not.

Mr. CAREY.—We object to that for the reason already ruled by your Honor when Mr. Kulzer was on the stand, a conversation between Smith and Kulzer.

The COURT.—It comes up here as an impeaching question.

Mr. CAREY.—Well, if the plaintiff cannot show the contract, I don't see why they are entitled to ask this question.

Mr. ZENT.—I take it that it is a question for the jury to decide.

The COURT.—Read the answer.

Mr. CAREY.—Exception.

Mr. RUSSELL.—(Reading:) "A. No, I did not."

Testimony of Stephen B. Carey, for Defendants.

STEPHEN B. CAREY, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. RUSSELL.)

Q. State your name to the jury.

A. Stephen B. Carey.

Q. What is your business?

A. I am an attorney.

Q. That was your business in July, 1915?

A. Yes, sir.

(Testimony of Stephen B. Carey.)

Q. You are the Mr. Carey who was a member of the firm of Post, Russell, Carey & Higgins at that time? A. Yes, sir.

Q. And you were representing Mr. Cole in this transaction with Mr. Helsley? A. I was.

Q. You had a talk with Mr. Helsley in reference to this transaction? [86]

A. A conference with him?

Q. Yes. A. Several of them.

Q. I will ask you to state, you know all about that, just how this transaction came up and what took place.

Mr. JESSEPH.—I object as indefinite. I think that a time should be fixed.

The COURT.—When did you first meet him?

A. Mr. Helsley and Mr. Cole, say during the middle of the week, I think on Wednesday, July 18th. It may have been on Tuesday before, the 17th. It was on one day of the other.

The COURT.—That is the first day you met Mr. Helsley?

A. No. In connection with this matter. I had met Mr. Helsley before, several months before. I had met Mr. Helsley first about June 1st when they were buying out the Wilson interest. But the first I met him in connection with this matter was on the 17th or 18th of July; that would be Tuesday or Wednesday.

The COURT.—You may proceed and state what occurred.

A. Mr. Helsley and Mr. Smith came into my office.

(Testimony of Stephen B. Carey.)
I had previously been advised by Mr. Cole that they would be there. At the same time Mr. Kover came, or if he did not come right at the same time he came in shortly afterwards, and they stated to me—

Mr. RUSSELL.—Q. Who is Mr. Kover?

A. Mr. Kover was the credit man of the Waterhouse-Sands Motor Company of Seattle. And they stated to me that they were there for the purpose of preparing this contract of sale, and I started to ask them questions to get the information that was necessary to prepare a written contract. And they all seemed to have rather vague notions about what the situation was, and it required considerable cross-examination on my part to find [87] out what the facts were. I may say that the four of us were in my office at the time. It finally developed that Mr. Kover claimed that there was $10,611 due on these trucks. The trucks were bought, as I now recall, on separate contracts, one truck a two-ton truck.

Mr. JESSEPH.—I object to that as immaterial.

A. I am stating what they said at the time. The two-ton truck was bought, as I now recall their statement, at one time, or under one contract, and there was $950 still due on it. The other three and a half ton trucks, five, were bought at different times or under a different contract, and there was $9,661 due on them, and that made a total of $10,611 on the six trucks, together with interest. The interest was figured up at the time, and I don't remember just exactly what it amounted to. Then the question came up as to what other outstanding liabilities

(Testimony of Stephen B. Carey.)

there were to be provided for in this written contract, and I asked Mr. Helsley about it and he seemed to have a very vague notion as to just what bills he did owe.

Mr. JESSEPH.—I move to strike that on the ground it is a conclusion.

The COURT.—I will strike it. You may state what was said.

A. Well, Mr. Helsley was not able at first to definitely tell me, but upon my insisting that it was necessary to knew what these bills were in order to provide for taking care of them in the contract, from one source and another he had given me a list which appears in this proposed draft of a contract, which was introduced in evidence yesterday. I remember very distinctly that Mr. Helsley gave me to believe that there was a substantial bill due the Firestone Tire & Rubber Company, and I suggested to him, and in fact insisted that he go and find out definitely what the amount of that bill was, which he did. And I think Mr. Smith went with him, on that trip, although I am not positive [88] as to that. Anyway, with this information that he then gave me I drew up this contract for the purpose of having it signed. Even after that Mr. Helsley then discovered that there was an additional bill that he had not given me, Chanslor & Lyon Company, $26.40, and upon him giving me that information I inserted that in my handwriting in the proposed contract. I told those gentlemen at that time that it was necessary for me to have all of this information in order that

(Testimony of Stephen B. Carey.)

I might advise Mr. Cole what amount of money that it would be necessary—

Mr. JESSEPH.—I object to what he told them. That is immaterial, and it is incompetent and it is irrelevant. The question is here what did they do?

The COURT.—Well, the conversation would be material, would it not?

Mr. JESSEPH.—I don't think that what he told them would be material. I think that what they said and did would be material but what counsel said certainly is not material.

The COURT.—It would be very material if an answer was made to it, and if it was stated in the presence of the parties and no answer was made it would be material. Proceed.

A. I told Mr. Kover, and Mr. Helsley also, I neglected to state, that of this $10,611 with interest that was due Mr. Kover's company, some $2,200 of it was overdue and had been overdue for some weeks, and Mr. Kover was pressing all parties that the same be paid up. And I informed Mr. Helsley and Mr. Kover and everybody else there at that time that it was necessary for me to know exactly what amount of liabilities there were in order that I might inform Mr. Cole what amount of money it would be necessary for him to forward in order to take care of the deal and put it through. And as I say, as I now recall, this contract was written on Wednesday the 18th, but matters dragged along for several days awaiting the money from Chicago, and during those [89] days there were continuous conferences back

(Testimony of Stephen B. Carey.)

and forth between us about one thing and another. On Thursday the 19th, I remember very distinctly of having a conversation with Mr. Kover and Mr. Helsley in the lobby of the Davenport Hotel, along late in the afternoon, in which I informed both of them that the money to take care of the deal was coming from Chicago and coming through me, and I showed Mr. Helsley on that occasion a telegram from Mr. Cole to me, or to my firm, concerning the money which was to be forwarded.

Q. In these conferences you had with Mr. Helsley in respect to this transaction, state whether or not anything was ever said about the American Mineral Production Company being a party to the contract.

A. There was not. It was never intimated to me that the American Mineral Production Company had anything to do whatever with the transaction.

Q. You got your information from Mr. Helsley in respect to the matters set forth in this contract?

A. From Mr. Helsey and Mr. Kover. Now I could not—

Q. They were there at the same time?

A. Oh, yes, they were both there together frequently.

Q. In any of those conferences you had, beginning with July 18th, and continuing, was there anything said by Mr. Helsley about any contract that he had previous to that time?

A. He never intimated to me in any way that he ever had any contract, any completed contract with anybody up to that time.

(Testimony of Stephen B. Carey.)

Q. When is the first time you ever heard that he made the claim to have an oral contract?

A. The first I ever heard of any claim on the part of Mr. Helsley that he had an oral contract for the sale of these trucks was when he testified here yesterday.

Q. Mr. Carey, these transactions that you had in your office with Mr. Helsley and Mr. Kover, does that relate merely to the [90] sale of trucks, or did it include some other articles?

A. It included all the property mentioned in this contract which I drew up and which was not signed.

Q. You told Mr. Helsley did you not that the money would have to come from Chicago in order to clean this thing up?

A. Yes, that is what the delay was about, awaiting the money to be transmitted to me to close it up.

Q. This form of contract that has been introduced in evidence never was signed by any of the parties named in it? A. No.

Cross-examination.

(By Mr. JESSEPH.)

Q. Mr. Carey, didn't you ever see a copy of the complaint in this case? A. Yes.

Q. And also a copy of the amended complaint in this case? A. Yes.

Q. You knew, then, did you not, that Mr. Helsley was claiming that he sold the trucks by an oral transaction? A. Yes.

Q. So you did know before yesterday that he claimed an oral deal?

(Testimony of Stephen B. Carey.)

A. Yes. Perhaps I misstated that. I meant that I never heard from Mr. Helsley any statement from him to the effect that he had an oral contract.

Q. Now, these conversations that you have testified to here all took place either on the 17th or the 18th or the 19th, perhaps, of July, of 1917?

A. Well, I would not want to fix it on any particular day. It seems to me, Mr. Jesseph, at the time that they were interminable. I thought that they were lasting a lifetime.

Q. And that got on your nerves a little, I presume? [91]

A. Not particularly, although I was glad to have it over with. Independent of memoranda which I have here, which indicate that it was on Wednesday the 18th, and relying only on my own memory, I would have said that they started on Tuesday the 17th, but I rather think it was Wednesday the 18th.

Q. Well, it was after the 14th or 15th at any event that these conversations occurred? A. Yes.

Q. Mr. Cole was not present at any of these conversations?

A. Mr. Cole had previously had a conversation with me personally, and then went on to Chicago. He was not present at the conversations that I referred to in my previous testimony.

Q. When did he have his conversation with you?

A. Well, it was in the latter part of the week before, but whether it was Friday or Saturday of the week before I could not say.

Q. Were you present at any of these negotiations

(Testimony of Stephen B. Carey.)

at the Spokane & Eastern Trust Company and the Davenport Hotel that the plaintiff has testified to between himself and Cole and Smith?

A. I was not.

Q. You never heard anything about those?

A. No, I did not.

Q. And you don't know what took place there?

A. Absolutely not. I was not there.

Q. Your firm of Post, Russell, Carey & Higgins at this time in July, 1917, were the attorneys for the American Mineral Production Company, were you not? A. Yes, sir.

Q. And you had been the attorneys for the company for some time prior to this?

A. Yes, we had been attorneys for the company ever since they started work up in Stevens County, which, as I recall now, was in **[92]** October, 1916; along about that time.

Q. You were put—you put in several days negotiating with these people back and forth about this transaction before it finally blew up?

A. Yes, they were in and out, I venture to say, about once an hour every day for several days.

Q. Looking for money?

A. Looking for money and telegrams and information, and for everything.

Q. Your bill for the services was paid, was it?

Mr. RUSSELL.—I object to that as immaterial.

A. I usually expect to have my bills paid, yes.

Mr. JESSEPH.—Q. Beg pardon?

A. I usually try to have my bills paid.

(Testimony of Stephen B. Carey.)

Q. Paid by the American Mineral Production Company?

Mr. RUSSELL.—I object to that as immaterial, if your Honor please.

Mr. JESSEPH.—It is a circumstance.

The COURT.—He may answer, if he knows.

A. I think so, I could not say positively, but I think so.

Mr. JESSEPH.—Q. Mr. Cole at this time was a resident of the city of Chicago? A. Yes, sir.

Q. That was his home?

A. Well, that was his business headquarters. I don't know where his home is.

Q. The only times that he had ever been here were just such times as he made a business trip here in connection with his interest in the American Mineral Production Company?

A. I don't know that, Mr. Jesseph. Mr. Cole did not come to see me except when he was here on business trips. Now whatever trips he may have made, I do not know. **[93]**

Q. He was the president of the company during all of this time? A. I understand so, yes.

Q. You say that you showed Mr. Helsley a telegram? A. Yes, sir.

Q. Have you got that telegram now?

A. I think so.

Q. The one that you showed them is the one I have in mind?

A. Yes, there is the telegram right there. I guess I broke off my story. I was going to state the cir-

(Testimony of Stephen B. Carey.)

cumstances under which I showed that.

Mr. JESSEPH.—Mark this.

Said telegram was marked Plaintiff's Exhibit 4 for identification.

Q. I am now showing you exhibit 4. Is that the telegram that you showed them? A. Yes.

Q. Mr. Kover and Mr. Helsley? A. Yes.

Mr. JESSEPH.—I am going to offer this, if your Honor please, and ask to read it.

Said telegram admitted in evidence and marked Plaintiff's Exhibit 4.

Mr. JESSEPH.—(Reading.) "Chicago, Illinois. July 19, 1917. Post, Russell, Carey & Higgins, Spokane, Washington. Have wired Spokane and Eastern pay you fifty-eight hundred dollars. Will wire two thousand dollars more covering payments on truck deal. C. R. Cole."

Redirect Examination.

(By Mr. RUSSELL.)

Q. Do you want to make some statement as to the circumstances under which you showed this telegram to these men?

A. Yes, I intended to state that in my direct examination and got switched off. As I said, these men were in my office [94] during this time, and were expected to get paid through our office but the money did not come. Finally, on the afternoon of Thursday, Mr. Kover, the representative of the Waterhouse-Sands Motor Company and Mr. Helsley had been in a number of times during that afternoon and finally Mr. Kover went back over to the hotel,

(Testimony of Stephen B. Carey.)

and they were very amazed at that time that the money had not arrived. And after they had left the office I received this telegram from Mr. Cole, which was timed 3:09 P. M., in which he had informed me that he had sent fifty-eight hundred dollars to the Spokane & Eastern Trust Company for us, as stated in this telegram, and that two thousand dollars additional would be there the next day. So I immediately went over to the Davenport Hotel, found Mr. Helsley in the lobby. That was the occasion on which I asked him yesterday that I met his wife at the same time, and went and found Mr. Kover, who was sitting in the east end of the lobby and I showed them this telegram for the purpose of indicating to them that the money would be here or be available the next morning at the opening of the bank. You notice this telegram was received by me after the banks had been closed for the day. Then the next morning, however, I received a telegram from Mr. Cole cancelling my authority to make any payment.

Q. Was that last telegram shown to Mr. Helsley, the one cancelling?

A. I cannot swear positively that I showed Mr. Helsley any telegram except this. I think I did, but I cannot swear to it.

Q. Mr. Carey, you acted as attorney for Mr. Cole in several matters, as well as the American Mineral Production Company, did you?

A. Why, I acted for Mr. Cole in a lot of real estate transactions, in which property was taken in his name personally, but I have every reason to believe

(Testimony of Stephen B. Carey.)

that he in those transactions was acting for the company. [95]

Recross-examination.

(By Mr. JESSEPH.)

Q. The real estate transactions that you mentioned, in which the title was taken in Mr. Cole's name, were for transactions for the American Mineral Production Company?

A. I belive so, Mr. Jesseph.

Q. All of the quarries up there were taken in Mr. Cole's name, the Allen quarry and the Woodbury quarry and the Red Marble?

A. I don't think all of them were. I know some of them were, and I think some of them were taken in the company's name, although I am not positive. I would not know without looking up the record.

Mr. RUSSELL.—Some of them were taken in Mr. Handy's name.

A. Some of them were taken in Mr. Handy's name.

(Witness excused.)

Mr. RUSSELL.—We rest, if your Honor please.

Mr. JESSEPH.—No rebuttal.

Mr. RUSSELL.—I would like at this time to renew the motion and challenge the sufficiency of the evidence, and to move for a judgment for the defendant, the American Mineral Production Company, the same as I did before.

The COURT.—I will submit the case to the jury.

(Thereupon counsel argued the case to the jury, after which the following proceedings were had:)

The COURT.—There is a preliminary question in

this case, gentlemen, that had not occurred to me. This complaint charges a joint sale to two persons. Now can there be any recovery at all without an amendment of the pleading eliminating Cole from the complaint?

Mr. ZENT.—That question has occurred to me, but the testimony went in without objection, and we desire now to amend to show a sale to the company. [96]

The COURT.—Eliminating Cole entirely?

Mr. ZENT.—Yes, sir.

Mr. RUSSELL.—I object to any amendment at this time. It seems to me that it comes rather late. If they found that Mr. Cole was not liable, then was the time, if any, when they should have asked leave to change their pleadings. It seems to me that under the conditions here that we should make a motion to dismiss this case for the additional reason that there is a variance between the proof and the pleadings.

The COURT.—That objection was not called to my attention at the time the motion for nonsuit was directed to the other defendant. Had it been, I probably would have directed a nonsuit to both and allow the amendment. If you can show that you will be prejudiced at this time, except purely a technical defect, I will hear from you.

Mr. RUSSELL.—We submit it as we have it, and take an exception.

The COURT.—I will allow the amendment.

Gentlemen of the Jury, the issue in this case is very simple. This complaint as amended charges

that on the 14th day of July, 1917, the defendant, the American Mineral Production Company, for a consideration of the sum of $5,500 orally purchased from the plaintiff, and the plaintiff sold to that defendant all of its right, title and interest in and to six motor trucks situated in the town of Valley, Stevens County, Washington, and particularly described as follows: Then follows a description of the six trucks. That the defendant immediately after said sale took possession of the said trucks and proceeded to operate the same for the hauling of magnesite from the defendant corporation to the town of Valley in said county and state. That on or about the 18th day of July, 1917, the plaintiff demanded payment of the defendant for said trucks, and the defendant has failed and refused, **[97]** and still fails and refuses to pay for the same. The sale is denied by the answer, and it is further alleged that there was no contract in writing, and no part of the purchase price was paid, and no delivery of any part of the property.

Under the law of this state the sale of personal property to the value of more than fifty dollars is void unless there is some written memorandum of the sale signed by the party to be charged, or unless some part of the purchase price has been paid, or unless there has been a delivery of the property, or some part of it.

Before the plaintiff can recover in this case, therefore, he must prove two facts: He must prove that a sale was made, as alleged in his complaint, and he must prove that the property was delivered to and

accepted by the corporation. If you find from a preponderance of the testimony offered here that there was a sale, that is, that there was an agreement between the parties on the part of the vendor to sell, and on the part of the purchaser to buy, that is, if you find that their minds met, and that the consideration was agreed upon, and the property was delivered and accepted by the corporation in furtherance of that sale, your verdict will be for the plaintiff for the amount claimed. If, on the other hand, the plaintiff has failed to establish either of these facts by the preponderance of the testimony, your verdict will be for the defendant.

You must further find in this connection that the agreement to purchase was made by the corporation. That is, you must find that Cole was acting for and representing the corporation at the time these negotiations took place. If you find from the testimony that he was acting for himself and on his own account, then there can be no recovery, and your verdict will be for the defendants.

You, gentlemen of the jury, are the sole judges of the facts in this case and of the credibility of the witnesses. Before [98] reaching a verdict you will carefully consider and weigh all of the testimony. You will observe the demeanor of the witnesses upon the stand, their interest in the result of your verdict, in so far as that has been disclosed; their knowledge of the facts in relation to which they have here testified, their opportunity for hearing, seeing or knowing those facts; the probability of the truth of their testimony, and of the facts and circumstances given

in evidence or concerning the witnesses during the trial.

The negotiations have been presented here on two different basis, and you have a right to consider what transpired on both occasions in so far as the later negotiations may throw light upon the prior negotiations when the agreement is alleged to have been made.

If you find for the plaintiff, he is entitled to the full amount claimed, that is, for the sum of $5,500, with interest at the rate of six per cent per annum from the 18th day of July last. I have computed the interest and added it to the verdict. That verdict will be signed by your foreman, if you find for the plaintiff. On the other hand, your foreman will simply sign the verdict as presented to you if you find for the defendant. Anything further?

Mr. ZENT.—Nothing for us.

The COURT.—You may now retire.

Thereafter the following proceedings were had:

On April 30, 1918, the defendant, American Mineral Production Company, served and filed its Motion for a New Trial, in words as follows, omitting the title:

"Comes now the defendant, American Mineral Production Company, and moves the Court for an order to set aside the verdict rendered by the jury in said cause and to set aside the judgment entered thereon, which verdict was rendered on **[99]** the 24th day of April, 1918, and judgment thereon was entered on the 25th day of April, 1918, and to grant a new trial in said cause upon the following ground:

1. Error in law occurring at the trial and excepted to by the defendant.

2. Insufficiency of the evidence to justify the verdict.

3. That the judgment is against the law.

As to the errors in law occuring at the trial to which exception was taken at the time the defendant, American Mineral Production Company, specified the particular errors which it relies upon, to wit:

(a) Error of the Court in denying the said defendant's challenge to the sufficiency of the evidence and the motion for a judgment at the close of plaintiff's case.

(b) Error of the Court in denying the defendant's challenge to the sufficiency of the evidence and a motion for judgment for the defendant, which motion was made at the close of the evidence of the entire case.

(c) Error of the Court in entering judgment in the cause.

As to the points of the insufficiency of the evidence to justify any verdict or judgment in favor of the plaintiff, the defendant specifies the particulars thereof as follows:

The defendant contends that most favorable evidence to the plaintiff is to the effect that the evidence shows that the plaintiff and C. R. Cole, who was president of the American Mineral Production Company, had some negotiations relating to the sale and purchase of the interest of the plaintiff in and to some auto trucks and his entire interest in and to a certain truck line known as the Cashmere Truck Line

and owned by C. R. Cole and the plaintiff in equal interests. That the evidence does not show that C. R. Cole was acting as an [100] officer of the American Mineral Production Company in these negotiations. That it was contemplated by C. R. Cole and the plaintiff that the negotiations when reduced to definite terms were to be set forth in written contract signed by the parties to the said negotiations. The evidence does not show that any contract in writing or otherwise was ever made between the defendant, American Mineral Production Company, and the plaintiff, nor between C. R. Cole and the plaintiff, as was contemplated by said negotiations.

This motion is based upon the pleadings and papers on file, the minutes of the Court, including not only the clerk's minutes but any notes or memorandum which may have been kept by the Judge of this court in the trial thereof, and also the reporter's transcript of his shorthand notes of said trial, and upon the exhibits introduced at the trial of said cause.

Dated at Spokane, Washington, this 30th day of April, A. D. 1918.

POST, RUSSELL, CAREY & HIGGINS,
Attorneys for the Defendant, American Mineral Production Company."

Whereupon on the 20th day of May, 1918, said motion for a new trial was taken up for hearing by consent of counsel, and the motion presented to the Court.

Whereupon, said Court made its order denying

said motion for a new trial, which order, omitting the title, is as follows:

"This cause coming on to be heard this 20th day of May, 1918, upon the motion of the above-named defendant, American Mineral Production Company, a corporation, for a new trial, plaintiff appearing by his attorney L. C. Jesseph and the defendant American Mineral Production Company appearing by its attorneys, Post, Russell & Higgins, and the Court having heard the arguments of counsel, and being fully advised in the premises. [101]

IT IS HEREBY ORDERED that said motion be and the same is hereby overruled, to which ruling the defendant American Mineral Production Company excepts and the exception is allowed.

Done this 20th day of May, 1918.

FRANK H. RUDKIN,

Judge."

On April 25, 1918, judgment was entered in favor of the plaintiff and against the defendant, American Mineral Production Company, which, omitting the title, is in the following language:

"This cause coming on to be heard this 23d day of April, 1918, before the Court and a jury upon the issues of law and fact raised by the pleadings and plaintiff appearing in person and by his attorneys, L. C. Jesseph and Zent & Powell, and the defendants appearing by their attorneys, Post, Russell, Carey & Higgins, and all the evidence having been adduced and the jury having received said cause and returned its verdict into court, finding for plaintiff

against the defendant, American Mineral Production Company, a corporation, in the sum of $5,753, and the defendant C. R. Cole having heretofore been ordered dismissed from said cause upon his motion, now upon motion of plaintiff's attorneys.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff have and recover judgment against the defendant, American Mineral Production Company, a corporation, in the sum of $5,753, together with his costs and disbursements herein paid out and expended and that said judgment draw interest at the rate of six per cent per annum from date hereof until paid.

Done in open court this 25th day of April, 1918.

FRANK H. RUDKIN,
Judge."

Whereupon defendant excepted to the rendering and entering of judgment in the above-entitled action, ordering and adjudging that the plaintiff herein have and recover of and from the [102] defendant, American Mineral Production Company, the sum of $5,753, together with his costs and disbursements herein paid out and expended, with interest thereon at the rate of six per cent per annum from the date of said judgment,—which exception was allowed by the Court.

Now, in furtherance of justice and that right may be done, the defendant, American Mineral Production Company, presents this bill of exceptions in this case and prays that the same may be cited, signed

and certified by the Judge as provided by law, and filed as a bill of exceptions.

(Signed) POST, RUSSELL, CAREY & HIGGINS,
Attorneys for Defendant, American Mineral Production Company.

Due service of the within Bill of Exceptions by true copy thereof is hereby admitted at Spokane, Washington, this 28th day of June, 1918.

(Signed) L. C. JESSEPH,
ZENT & POWELL,
Attorneys for Plaintiff. [103]

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

Now, on this 17th day of July 1918, the above cause coming on for hearing on the application of the defendant American Mineral Production Company, a corporation, to settle the bill of exceptions in said cause; defendant appearing by its counsel, Post, Russell, Carey & Higgins, and the plaintiff appearing by L. C. Jesseph and Zent & Powell, his attorneys, and it appearing to the Court that the defendant's proposed bill of exceptions was duly served upon the attorneys for the plaintiff, within the time provided by law, and that all amendments suggested thereto by the plaintiff have been duly allowed, and that the time for settling said bill of exceptions has not expired, and it further appearing to the Court that said bill of exceptions contains all the material facts occurring in the trial of said cause together with

exceptions thereto, and all material matters and things occurring upon said trial except exhibits 1, 2, 3, and 4, introduced in evidence, which are hereby made a part of said bill of exceptions, and the clerk is hereby ordered and instructed to attach the same thereto;

THEREFORE, upon the motion of A. E. Russell, one of the attorneys for the defendant,

IT IS HEREBY ORDERED that the said proposed bill of exceptions with the amendments allowed by this Court be and the same is hereby settled as a true bill of exceptions in said cause, and the same is hereby certified accordingly by the undersigned, Judge of this court, who presided [**104**] at the trial of said cause, that it conforms to the truth and that it is in proper form, and that it is a full, true and correct bill of exceptions, and the clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Done in open court the day and year first above written.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington. July 17th, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [**105**]

[Title of Court and Cause.]

Petition for Order Allowing Writ of Error.

Comes now the defendant American Mineral Production Company in the above-entitled cause and feeling itself aggrieved by the rulings of the Court and the judgment entered on the 25th day of April, 1918, complains in the record and proceedings had in said cause and also of the rendition of the judgment in the above-entitled cause in said United States District Court against said defendant on the 25th day of April, 1918, that manifest error hath happened to the great damage of said defendant, American Mineral Production Company, and petitions this Court for an order allowing the said defendant to prosecute a writ of error to the Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made, and provided also that an order be made fixing the amount of the security which the defendant shall give and furnish upon said writ of error, and upon the giving of such security, all further proceedings of this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated at Spokane, Washington, this 28th day of June, 1918.

(Signed) POST, RUSSELL, CAREY & HIGGINS,

Attorneys for Defendant, American Mineral Production Company. [106]

[Endorsements]: Petition for Order Allowing Writ of Error. Due service of the within petition by a true copy thereof is hereby admitted at Spokane, Washington, this 28th day of June, 1918. (Signed) Zent & Powell and L. C. Jesseph, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington. June 28, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [107]

[Title of Court and Cause.]

Assignment of Errors.

Comes now the defendant, the American Mineral Production Company, and files the following assignments of error, upon which it will rely upon its prosecution of the writ of error in the above-entitled cause from the judgment made by this Honorable Court upon the 25th day of April, 1918, in the above-entitled cause.

I.

That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in denying the challenge of the sufficiency of the evidence, and motion for a judgment in favor of the American Mineral Production Company made at the close of the plaintiff's case, for the following reasons:

1. That the evidence did not show any contract between the plaintiff and the defendant American Mineral Production Company.

2. That the evidence did not show any cause of

action in favor of the plaintiff and against the defendant, as alleged in the amended complaint in said cause, or at all.

3. That the contract alleged in the amended complaint and as alleged at the trial was not proven by the evidence produced at the trial.

II.

That the Court erred in denying defendant's challenge to the sufficiency of the evidence and motion for a judgment in favor of the American Mineral Production Company at the close of all the [108] evidence in the case for the following reasons:

1. That the evidence did not show any contract between the plaintiff and the defendant American Mineral Production Company.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the said defendant, as alleged in the amended complaint in said cause, or at all.

3. That the contract alleged in the amended complaint and as alleged at the trial was not proven by the evidence produced at the trial.

III.

That the Court erred in ordering judgment to be entered in said action in favor of the plaintiff and against the defendant, American Mineral Production Company.

IV.

That the Court erred in rendering and entering judgment in favor of the plaintiff and against the defendant, American Mineral Production Company.

WHEREFORE, the said American Mineral Pro-

duction Company, plaintiff in error, prays that the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, be reversed, and that said District Court be directed to enter judgment in said action in favor of said defendant American Mineral Production Company.

(Signed) POST, RUSSELL, CAREY & HIGGINS,

Attorneys for Plaintiff in Error, Defendant in the Lower Court, American Mineral Production Company.

[Endorsements]: Assignment of Errors. Due service of the within Assignment of Errors by true copy thereof is hereby admitted at Spokane, Washington, this 28th day of June, 1918. Zent & Powell, and L. C. Jesseph, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington. June 28, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [109]

[Title of Court and Cause.]

Order Allowing Writ of Error.

Upon motion of Post, Russell, Carey & Higgins, attorneys for the defendant, American Mineral Production Company, and upon filing a petition for writ of error and an assignment of errors,—

It is ORDERED that a writ of error be, and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the

judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at the sum of seven thousand five hundred dollars ($7,500), which said bond may be executed by said defendant as principal, its attorneys herein, and by such surety or sureties as shall be approved by this Court, and which shall operate as a supersedeas bond, and a stay of execution is hereby granted, pending the determination of such writ of error.

Done in open court this 28th day of June, 1918.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Order Allowing Writ of Error. Service of the within Order by a true copy thereof is hereby admitted at Spokane, Washington, this 28th day of June, 1918. (Signed) L. C. Jesseph and Zent & Powell, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, June 28, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [110]

[Title of Court and Cause.]

Order Allowing Bond.

The defendant, American Mineral Production Company, having this day filed a petition for a writ of error from the rulings, decisions and judgment made and entered in said action to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with assignment of errors,

within due time, and also praying that an order be made fixing the amount of security which it should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Circuit, and said petition having been this day duly allowed;

Now, therefore, it is ORDERED that upon the said defendant American Mineral Production Company filing with the clerk of this court a good and sufficient bond in the sum of seven thousand five hundred dollars ($7,500) to the effect that if the said American Mineral Production Company, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good, then the said obligations to be void, else to remain in full force and virtue, the said bond to be approved by the Court; that all further proceedings in this court be and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit **[111]** Court of Appeals.

Dated this 28th day of June, 1918.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Order Allowing Bond. Due service of the within Order by a true copy thereof is hereby admitted at Spokane, Washington, this 28th day of June, 1918. (Signed) Zent & Powell, and L. C. Jesseph, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of

Washington. June 28, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [112]

[Title of Court and Cause.]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, American Mineral Production Company, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto F. M. Helsley in the full and just sum of seven thousand five hundred dollars ($7,500), to be paid to the said F. M. Helsley, for which payment well and truly to be made, we bind ourselves, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 28th day of June, 1918.

WHEREAS, lately at the April Term, A. D. 1918, the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said court between F. M. Helsley, plaintiff, and C. R. Cole and American Mineral Production Company, defendants, a final judgment was rendered against the said defendant American Mineral Production Company and in favor of the said plaintiff, and the said defendant American Mineral Production Company having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said F. M. Helsley is about to be issued, citing and admonishing him to be and appear at the United

States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, thirty days from and after the filing of said citation; [113]

Now, the condition of the above obligation is such, that if the said American Mineral Production Company shall prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

(Signed) AMERICAN MINERAL PRODUCTION COMPANY.

By POST, RUSSELL, CAREY & HIGGINS,

Its Attorneys.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

Its Attorney-in-Fact.

[Corporate Seal] By M. B. CONNELLY,

The foregoing bond is approved as to form, amount and sufficiency of surety this 28th day of June, 1918.

(Signed) FRANK H. RUDKIN,

Judge of the United States District Court for the Eastern District of Washington, Northern Division.

[Endorsements]: Bond on Writ of Error. Due service of the within bond by a true copy thereof is hereby admitted at Spokane, Washington, this 28th day of June, 1918. (Signed) Zent & Powell and L. C. Jesseph, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of

Washington. June 28, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [114]

[Title of Court and Cause.]

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable, the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you at the April, 1918, Term, thereof, between F. M. Helsley, as plaintiff, and American Mineral Production Company, defendant, a manifest error hath happened to the great damage of the said American Mineral Production Company, plaintiff in error, as by its complaint appears;

We being willing, that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 28th

day of July, next, in the said Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, which [115] according to the laws of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 28th day of June, 1918, of the Independence of the United States the one hundred forty-second year.

[Seal] (Signed) W. H. HARE,
Clerk of the District Court of the Eastern District of Washington, Northern Division.

Allowed by:

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Writ of Error. Service of the within Writ of Error and receipt of copy thereof is hereby admitted this 28th day of June, 1918. (Signed) L. C. Jesseph and Zent & Powell, Attorneys for the Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington. June 28, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [116]

[Title of Court and Cause.]

Citation on Writ of Error.

The President of the United States to F. M. Helsley and to L. C. Jesseph and Zent & Powell, His Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein F. M. Helsley is plaintiff, and you are defendant in error and American Mineral Production Company is plaintiff in error, to show cause why, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 28th day of June, 1918, and the Independence of the United States the one hundred forty-second year.

(Signed) FRANK H. RUDKIN,

United States District Judge for the Eastern District of Washington, Northern Division.

[Seal] Attest: (Signed) W. H. HARE,

Clerk. [117]

[Endorsements]: Citation on Writ of Error. Due service of the within Citation by true copy thereof is

hereby admitted at Spokane, Washington, this 28th day of June, 1918. (Signed) L. C. Jesseph and Zent & Powell, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington. June 28, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [118]

[Title of Court and Cause.]

Stipulation as to Transcript of Record.

IT IS HEREBY STIPULATED between the plaintiff, by his attorneys, and the defendant, American Mineral Production Company, by its attorneys, that the transcript of the record on the writ of error in the above-entitled cause shall be made up of the following papers:

Amended complaint.
Answer to amended complaint.
Reply.
Verdict.
Plaintiff's motion for new trial.
Order denying motion for new trial.
Stipulation extending time for filing proposed bill of exceptions.
Judgment.
Bill of exceptions.
Petition for writ of error.
Assignment of errors.
Bond on writ of error.
Order allowing bond.
Order allowing writ of error.
Stipulations as to making up record.

Writ of error.

Praecipe.

Citation on writ of error. **[119]**

Order extending time.

Dated this 16th day of July, 1918.

(Signed) POST, RUSSELL, CAREY & HIGGINS,

Attorneys for Defendant and Plaintiff in Error.

L. C. JESSEPH,

ZENT & POWELL,

Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Stipulation. Filed in the U. S. District Court for the Eastern District of Washington. July 16, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. **[120]**

[Title of Court and Cause.]

Stipulation as to Printing Transcript of Record.

IT IS HEREBY STIPULATED by plaintiff in error by its attorneys, and by defendant in error, by his attorneys, that in printing the record in the above-entitled action, the clerk shall cause the following to be printed for the consideration of the Court on Appeal:

Amended complaint.

Answer to amended complaint.

Reply.

Verdict.

Plaintiff's motion for new trial.

Order denying motion for new trial.

Judgment.

Stipulation extending time for filing proposed bill of exceptions.
Bill of exceptions.
Petition for writ of error.
Assignment of errors.
Bond on writ of error.
Order allowing bond.
Order allowing writ of error.
Stipulations as to making up record.
Writ of error.
Praecipe.
Citation on writ of error. [121]
Order extending time.

IT IS FURTHER STIPULATED that in printing the said record, there may be omitted therefrom the title of the court and cause on all papers, excepting the first page, and that in lieu of said court and cause there be inserted in the place and stead thereof, the following words, "Title of Court and Cause."

Dated this 16th day of July, 1918.

(Signed) POST, RUSSELL, CAREY & HIGGINS,
Attorneys for Defendant and Plaintiff in Error.

L. C. JESSEPH,
ZENT & POWELL,
Attorneys for Plaintiff and Defendant in Error.

[Endorsements]: Stipulation. Filed in the U. S. District Court for the Eastern District of Washington. July 16, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [122]

[Title of Court and Cause.]

Order Extending Time to August 15, 1918, to File Transcript.

United States of America,—ss.

This matter coming on to be heard on application of American Mineral Production Company, a corporation, the appellant, for an order extending the time for appearance in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, to the 15th day of August, 1918, and it appearing to the Court that the attorneys for the appellee have consented to said extension,—

IT IS ORDERED that the time for filing the transcript or for the appearance by either appellee or the appellant, or either of them, in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, is continued until the 15th day of August, 1918, to the same extent and effect as though the citation issued herein had cited and admonished said appearance for the said 15th day of August, 1918.

Done in open court this 18th day of July, 1918.

(Signed) FRANK H. RUDKIN,
United States District Judge.

[Endorsements]: Order. Filed in the U. S. District Court for the Eastern District of Washington. July 18, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [123]

[Title of Court and Cause.]

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error heretofore perfected and allowed to said court, which record shall be transmitted in printed form to the Clerk of the Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following files, proceedings and papers on file:

Amended complaint.
Answer to amended complaint.
Reply.
Verdict.
Plaintiff's motion for new trial.
Order denying motion for new trial.
Judgment.
Stipulation extending time for filing proposed bill of exceptions.
Bill of exceptions.
Petition for writ of error.
Assignment of errors.
Bond on writ of error.
Order allowing bond.
Writ of error. [124]
Order allowing writ of error.
Citation on writ of error.

Stipulations as to making up record.
Praecipe.
Order extending time.

(Signed) POST, RUSSELL, CAREY & HIGGINS,
Attorneys for Plaintiff in Error.

[Endorsements]: Praecipe. Filed in the U. S. District Court for the Eastern District of Washington. June 28, 1918. W. H. Hare, Clerk. By S. M. Russell, Deputy. [125]

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States in and for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages constitute and are a full, true, correct and complete copy of so much of the record, pleadings, orders and other proceedings had in said action, as the same remain of record and on file in the office of the clerk of the said District Court, as called for by the defendant and plaintiff in error in its praecipe; and that the same constitute the record on writ of error from the judgment of the District Court of the United States in and for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California, which writ of error was lodged and filed

in my office on June 28th, 1918.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause, together with original stipulation as to printing record, and original exhibits 1, 2, 3 and 4.

I further certify that the fees of the clerk of this court for preparing and certifying to the foregoing typewritten record amount to the sum of fifty-two dollars and ten cents ($52.10), and that the same has been paid in full by Post, Russell, [126] Carey & Higgins, attorneys for the defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in the said District, this 19th day of July, 1918.

[Seal] W. H. HARE,
Clerk. [127]

[Endorsed]: No. 3184. United States Circuit Court of Appeals for the Ninth Circuit. American Mineral Production Company, a Corporation, Plaintiff in Error, vs. F. M. Helsley, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed July 23, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN MINERAL PRODUCTION COMPANY, a corporation,

Plaintiff in Error,

vs.

F. M. HELSLEY,

Defendant in Error.

No. 3184

Upon Writ of Error from United States District Court in and for the Eastern District of Washington, Northern Division.

Brief of Plaintiff in Error

POST, RUSSELL, CAREY & HIGGINS,
Attorneys for Plaintiff in Error,
Spokane, Washington.

PETERSON & ROSS · PRINTERS · SPOKANE 6147

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

AMERICAN MINERAL PRODUCTION COMPANY, a corporation,
Plaintiff in Error,
vs.
F. M. HELSLEY,
Defendant in Error.

No. ----------

Upon Writ of Error from United States District Court in and for the Eastern District of Washington, Northern Division.

Brief of Plaintiff in Error

POST, RUSSELL, CAREY & HIGGINS,
Attorneys for Plaintiff in Error,
Spokane, Washington.

STATEMENT OF CASE.

This is an action brought by F. M. Helsley as plaintiff against C. R. Cole and American Mineral Production Company, defendants, and, according to the amended complaint, Mr. Helsley contended that

C. R. Cole was a resident of Chicago, Illinois, and that the American Mineral Production Company was a corporation organized under the laws of the State of South Dakota, and that on about the 14th day of July, 1917, the defendants, in consideration of the sum of $5500.00, orally purchased from the plaintiff, and the plaintiff sold to the defendants, all his right, title and interest in and to six motor trucks described in detail in said amended complaint, and further alleged in the complaint that immediately after the sale the defendants took possession of said trucks, and commenced to operate same, hauling magnesite from the quarries of the defendant corporation; that demand for the payment had been made and refused, and plaintiff prayed judgment in the sum of $5500.00 with interest from the 15th day of July, 1917. (Transcript, pp. 1-3.)

The answer to the amended complaint admitted that Mr. Cole was a resident of the City of Chicago, and that the defendant corporation was a South Dakota corporation, and denied the purchase of the personal property mentioned in the amended complaint, and taking possession, and placed in issue all of the material facts alleged in the amended complaint, and for further answer and affirmative defense it was alleged that any negotiations that were had between the plaintiff and defendants, or either of them, for the sale of the trucks were entirely oral, and that the defendants did not accept or receive any part of the goods or give anything in earnest of the said

bargain, or sign any note or memorandum in writing, and that the alleged contract of sale mentioned was void under Sec. 5290, Remington & Ballinger's Annotated Codes and Statutes of the State of Washington. (Trans., 4.)

The reply of Mr. Helsley denied the allegations contained in the affirmative defense.

The case came on for trial on the 23rd day of April, 1918, at which time testimony was taken before the court and a jury.

The evidence of plaintiff shows that in the early part of the year 1917, Mr. Helsley and one John Wilson were co-partners in what is known as the Cashmere Truck Line, and on or about the 1st of June, 1917, Mr. Wilson sold his interest in the Cashmere Truck Line to Mr. C. R. Cole. At the time of the sale of the interest of John Wilson to C. R. Cole in and to this Cashmere Truck Line, a representative of Waterhouse-Sands Company, the concern that sold the motor trucks to Wilson and Helsley, was present and consented to the transaction, it being a provision in the contract of sale of the motor trucks by Waterhouse-Sands Company to Helsley and Wilson that no sale could be made by them unless consented to and approved by Waterhouse-Sands Company, or their representative. (Trans., 26.)

The firm of Cashmere Truck Line, when composed of Wilson and Helsley, made a contract with the

American Mineral Production Company to haul ore from its quarries near Valley, Washington, to Valley, Washington, and this continued until the sale of Wilson's interest to Mr. Cole on or about June 1st, 1917. After the sale of Mr. Wilson's interest to Mr. Cole, these same trucks were used to perform the contract with the American Mineral Production Company under the supervision and charge of Mr. Helsley.

In the latter part of June, 1917, Mr. Cole went to Valley, Washington, where he met Mr. Helsley and negotiations were commenced between Mr. Cole and Mr. Helsley for the sale and purchase of the interest of one or the other to the other. The negotiations continued in Spokane, Washington, on or about the 14th day of July, 1917. Mr. Helsley states that on that date a deal was closed at a meeting where Mr. Cole, Mr. Smith, Mr. Helsley and Mr. Cowan were present. Mr. Helsley testified that so far as he knew Mr. Cole was president of the American Mineral Production Company, and that Mr. T. P. Smith was an accountant for the American Mineral Production Company. No showing was made by Mr. Helsley, either in his own testimony or in the testimony of any other witness, that he was dealing with Mr. Cole as president of the American Mineral Production Company in this transaction.

After the meeting in Spokane, Washington, on the afternoon of the 14th of July, 1917, Helsley went back to Valley, Washington, and left the trucks with

the American Mineral Production Company and went fishing until the 17th or 18th of July, when he again came to Spokane for the purpose, as he says, of getting payment on these trucks. He stated that the deal made with Mr. Cole on the 14th day of July was that Mr. Cole was to pay him $5500.00 for his interest in the trucks, and assume all obligations incurred by reason of the purchase price or the operation of these trucks. When he went to Valley on or about the 14th day of July, 1917, he not only left the trucks with the American Mineral Production Company, but also turned over to them all oil and gasoline which he had on hand for the purpose of operating these trucks.

No representative of Waterhouse-Sands Company was present at the meeting in Spokane on July 14th, 1917. On the 18th of July, 1917, when Mr. Helsley went to Spokane and to the office of Mr. Carey, attorney for Mr. Cole, for the purpose, as he says, of getting the payment for the trucks, there was present a Mr. Kover, who was there representing the Waterhouse-Sands Company, and at this time at a meeting between Mr. Helsley, Mr. Smith and Mr. Carey, attorney for Mr. Cole, much conversation was had relative to the amount of the bills outstanding against the truck company. The amount of these was not known by any parties to this transaction. At this time some of these were obtained by Mr. Hilsley, and a form of written contract was prepared for signature, which contract was never signed. This

form of written contract is introduced in evidence as defendants' exhibit 3. This exhibit was offered to Mr. Helsley on the witness stand, and he stated he knew nothing of it except that he knew one was being made up for the transaction, and that he knew when he was in Mr. Carey's office with Mr. Kover and Mr. Smith, that Mr. Carey was getting information to prepare a written contract. He thought the written contract would be signed, and he expected to sign it. (Trans., 39.)

It further appeared from plaintiff's testimony that when Helsley went to Valley on the 14th of July, a man by the name of Bunyard took charge of the trucks for the American Mineral Production Company and proceeded to operate them with the same crew Helsley had had prior to that time. These men were all paid by the American Mineral Production Company from and after July 15, 1917.

At the close of the plaintiff's case a challenge was made to the sufficiency of the evidence as to C. R. Cole, and a motion was made for a judgment in his behalf, and also a like challenge and motion were made on behalf of the American Mineral Production Company. The court sustained the motion as to C. R. Cole, and denied the challenge and motion as to the American Mineral Production Company. Exception was taken to the ruling of the court on the motion in behalf of the American Mineral Pro-

duction Company, and the case proceeded with the defense.

At the conclusion of the defendants' case, the challenge to the sufficiency of the evidence in behalf of the American Mineral Production Company was renewed and denied by the court, and exception was taken. On motion of plaintiff the amended complaint was amended eliminating Cole from the case. (Trans., 104.)

The case was submitted to the jury on instructions and they returned a verdict in favor of the plaintiff and against the American Mineral Production Company in the sum of $5753.00, together with costs and disbursements.

A motion for new trial was made and denied.

The court fixed the bond on the writ of error in the sum of $7500.00. Said bond was furnished and filed and approved on the 28th day of June, 1918. The writ of error was granted on petition of the American Mineral Production Company and the record was filed. Assignments of error were also served and filed and are as follows:

ASSIGNMENTS OF ERROR.

"I.

That the United States District Court, in and for the Eastern District of Washington, Northern Division, erred in denying the challenge to the

sufficiency of the evidence, and motion for a judgment in favor of the American Mineral Production Company was made at the close of the plaintiff's case, for the following reasons:

1. That the evidence did not show any contract between the plaintiff and the defendant American Mineral Production Company.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the defendant, as alleged in the amended complaint in said cause, or at all.

3. That the contract alleged in the amended complaint and as alleged at the trial was not proven by the evidence produced at the trial.

II.

That the court erred in denying defendant's challenge to the sufficiency of the evidence and motion for a judgment in favor of the American Mineral Production Company at the close of all the evidence in the case for the following reasons:

1. That the evidence did not show any contract between the plaintiff and the defendant American Mineral Production Company.

2. That the evidence did not show any cause of action in favor of the plaintiff and against the said defendant, as alleged in the amended complaint in said cause, or at all.

3. That the contract alleged in the amended complaint and as alleged at the trial was not proven by the evidence produced at the trial.

III.

That the court erred in ordering judgment to be entered in said action in favor of the plaintiff and against the defendant American Mineral Production Company.

IV.

That the court erred in rendering and entering judgment in favor of the plaintiff and against the defendant, American Mineral Production Company."

ARGUMENT.

We beg to call to the attention of the court at this time, that in paragraph three of the assignments of error are the words "as alleged at the trial." These words should read "as amended at the trial."

The assignments of error in this case are based upon the contention that no contract with the American Mineral Production Company was shown by the evidence in this case.

The evidence is undisputed that prior to June 1st, 1917, F. M. Helsley and one John Wilson were co-partners operating a truck line under the name of Cashmere Truck Line. They had a contract with the American Mineral Production Company for hauling magnesite from the quarries of that company to the railroad at Valley, Washington. They continued to act under this contract until June 1st, 1917, when John Wilson sold his interest in and to the Cashmere Truck Line to one C. R. Cole.

When Wilson and Helsley were running the Cashmere Truck Line they purchased some motor trucks from Waterhouse-Sands Company on a conditional sales contract. This contract provided that no sale

of any interest in the trucks could be made by the vendee unless there be consent thereto by the vendor or its representatives. When Mr. Cole purchased Mr. Wilson's partnership interest in and to this truck line Mr. Mandell, the representative of Waterhouse-Sands Company, was present and consented to the transfer of Mr. Wilson's interests to C. R. Cole.

After the date of this transfer of Wilson's interests to Cole, the truck line continued to operate under the contract with the American Mineral Production Company for hauling magnesite. This contract appears to be the only one that the truck line had, and that is the only work the truck line was doing.

This condition continued until Mr. Cole went to Valley about June 25, 1917, where he took up the matter of selling Mr. Cole's interests to Helsley or of Mr. Cole buying Helsley's interest in the truck line, which Helsley could not do. These negotiations continued for some time, both at Valley, Washington, and at Spokane, Washington, and on Saturday, July 14th, 1917, Helsley and Cole met in Spokane, at which time Helsley says the deal was completed. He says he was to turn over everything for $5500.00 and be released from all obligations on the purchase price of the trucks and those incurred in operating the trucks. This is denied by Cole. On July 14th, 1917, the total amount of the accounts outstanding against the truck line was unknown both to Helsley and to Cole. No money was

put in the deal at that time; no delivery of trucks was made at that time, no representative of Waterhouse-Sands Company was present; and no consent of Waterhouse-Sands Company was given to the transfer of Helsley's interest in the trucks, as provided by the conditional sale contract. Nothing was said in any of these negotiations about the American Mineral Production Company. It is true that Helsley testified while on the witness stand that so far as he could find Mr. Cole was president and manager or whatever you might call it of American Mineral Production Company, but nowhere does he state, nor does his evidence show at any place that Mr. Cole was acting in the capacity of president, or that of any other officer of the American Mineral Production Company in these negotiations. Helsley's testimony as shown on page 16 of the transcript was to the effect that he had negotiations with the *defendants*. Both Cole and American Mineral Production Company were defendants in this case. His complaint was drawn on the theory that there was a sale to both defendants, not that he sold to the American Mineral Production Company or to C. R. Cole. He expected the money for the transaction to be paid by C. R. Cole, not by C. R. Cole as president or manager of the American Mineral Production Company, nor by the American Mineral Production Company.

At the close of the entire evidence in this case counsel for Mr. Helsley made a motion to dismiss

this case as to Mr. Cole and to stand on the evidence in a claim against the American Mineral Production Company.

Events subsequent to July 14th, 1917, show conclusively, we contend, that Mr. Helsley did not think that the transaction was completed on July 14th, 1917. He came to Spokane, Washington, on the 18th of July, 1917, and went to the office of Mr. Carey, who was attorney for Mr. Cole. At that time there was present a Mr. Kover, who was a representative of the Waterhouse-Sands Company. When Mr. Helsley went to Mr. Carey's office, steps were taken by both Mr. Carey and Mr. Helsley to ascertain the amounts of the various accounts against the Cashmere Truck Line. This was done for the purpose of putting the same in a contract to be signed by Mr. Helsley and Mr. Cole. This contract was reduced to writing and the various amounts which were obtained after much effort on the part of both Helsley and Mr. Carey were inserted in said contract. Mr. Helsley testified, as shown on page 39 of the transcript, that he understood that they were drawing up a written contract and that he expected to sign it; that this was July 18th, 1917, four days after the conversation he had with Mr. Cole in the Spokane & Eastern Trust Company. He further testifies that he did not sign such contract, but that the defendants' Exhibit No. 3, which was shown Mr. Helsley when he was on the witness stand (Trans., 36), contained the terms of the agreement as he

understood them. On page 52 of the transcript Mr. Helsley testified that he went to Spokane on the 18th day of July, 1917, and that he expected that this contract would be reduced to writing, and he went to Mr. Carey's office for that purpose.

Assuming, for the purpose of this point, that Mr. Cole was acting in his capacity of president or manager of the American Mineral Production Company in this transaction, and that the negotiations were had between the American Mineral Production Company looking forward to the sale of Helsley's interest in the truck line to the American Mineral Production Company, under the testimony referred to immediately heretofore, undoubtedly it was contemplated by the parties to the transaction that the terms of the contract were to be reduced to writing after all the facts could be collected for the purpose of inserting the same therein. These facts were not in the hands of either party until the 18th day of July, 1917, after the amounts of the accounts had been ascertained. Under these circumstances, the contract would not be complete until it had been reduced to writing and signed by the parties thereto.

> *McDonnell v. Coeur d'Alene Lumber Company*, 56 Wash., 495; 26 L. R. A. (N. S.) 222;
>
> 9 *Cyc.* 280
>
> *McCormick v. Oklahoma City*, 203 Fed. 921.

As pointed out above, the trucks involved in this transaction had been purchased from Waterhouse-

Sands Company on a conditional sale contract, which provided, among other things, that the vendees could not sell or transfer their right without the written consent or approval of the Waterhouse-Sands Company, or their representative. The obtaining of this approval or consent was a necessary condition precedent before Mr. Helsley had any right or authority to transfer any interest that he might have in the trucks. This procedure was followed in the case of the sale of any interest Wilson had to Mr. Cole, and the written approval of that transaction was given by the representative of the Waterhouse-Sands Company. As pointed out above, no representative of the Waterhouse-Sands Company appeared in the transaction between Mr. Helsley and Mr. Cole until the 18th of July, when the written contract was being prepared for signature, and Mr. Helsley was in no position to complete the transaction between him and Mr. Cole until this approval had been obtained. Conditions of this kind have been upheld, and the vendee of personal property under a contract of conditional sale cannot pass title without the consent of the vendor.

> *National Cash Register Co. v. Ferguson*, 55 N. Y. Supp. 592.

The fact that Mr. Cole was president of the corporation does not establish that he was acting in that capacity in these negotiations. It is true that Mr. Helsley says so far as he could find Mr. Cole was the president and manager of the American Mineral

Production Company. Mr. Cole testifies positively and emphatically on the stand that he was president of that company. But this fact alone does not make the transaction one of the company. It may be that the contract was beyond the scope of authority of Mr. Cole as president of the corporation; it may be that the contract was one that the corporation did not desire to make; it may be that it was a contract that the corporation as such could not make. There must be some showing of authority of Mr. Cole to represent the corporation in this transaction, and that he did actually act for said corporation. Unless this be shown, the corporation cannot be held on this claim.

> *Cook on Corporations*, §716 (7th Ed.);
> *Woodruff v. Shimer,* 174 Fed 584.

There is another reason why the evidence in this case does not establish an enforcible contract between Helsley and the American Mineral Production Company. As pointed out above, Mr. Helsley and Mr. Wilson were co-partners in the truck line; that Mr. Wilson sold his interests in the truck line to Mr. Cole on or about June 1st, 1917. When Mr. Cole tried to negotiate with Mr. Helsley for his interest in the trucks, he could not have negotiated with Mr. Helsley for the American Mineral Production Company, a corporation, to purchase the interest of Mr. Helsley in this partnership. The law is that a corporation has no power to enter into a partnership in the absence of statutory authority.

Fechteler v. Palm Bros. & Co., 133 Fed. Rep. 462-465, and cases there cited.

No Washington statute giving authority to a corporation to enter into a co-partnership is shown in this case, and there is no such Washington statute. It is true that the American Mineral Production Company is a corporation organized under the laws of South Dakota, but in the absence of showing to the contrary, the presumption is that the laws of the State of South Dakota are identical with the laws of the State of Washington on this subject.

Gunderson v. Gunderson, 24 Wash. 459;

Hickman v. Alpaugh, 21 Cal. 226;

Sheppard v. Coeur d'Alene Lumber Co., 62 Wash. 12.

Moreover, reference to the statutes of South Dakota does not disclose a statute granting such power to a corporation.

It is true that Mr. Helsley testified in this case that when he went to Valley, on the night of the 14th of July, 1917, he turned everything over to the American Mineral Production Company; that they took possession of and continued to operate the trucks until they were taken from the American Mineral Production Company on the 21st day of July, 1917, by the sheriff under a foreclosure sale. But we contend that the mere fact that Helsley walked out and left these trucks in possession of the American Mineral Production Company does not strengthen his

contention that the contract was completed. His subsequent conduct in getting the information to put in the proposed written contract, which he expected to sign, information which was not at hand on July 14th, 1917, and information that was necessary to incorporate in the contract in order to make it complete, and the necessity of getting the approval of Waterhouse-Sands Company, are sufficient to show that the contract was not completed on July 14th, 1917.

We submit that the court erred in not sustaining the challenge to the sufficiency of the evidence and in granting the motion for the judgment in behalf of the American Mineral Production Company, both at the close of plaintiff's case and at the close of the entire case; that the judgment is erroneous and should be reversed, and the case remanded for a new trial.

POST, RUSSELL, CAREY & HIGGINS,
Attorneys for Plaintiff in Error,
Spokane, Washington.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

6

AMERICAN MINERAL PRODUCTION COMPANY, a corporation, *Plaintiff in Error,* *vs.* F. M. HELSLEY, *Defendant in Error.*	No. 3184

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

FILED
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ZENT & POWELL,
Spokane, Washington,
L. C. JESSEPH,
Colville, Washington,
Attorneys for Defendant in Error.

YOUNG PRINTING COMPANY, SPOKANE

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

AMERICAN MINERAL PRODUCTION COMPANY, a corporation,
Plaintiff in Error,
vs.
F. M. HELSLEY,
Defendant in Error.

No. ....

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

ZENT & POWELL,
Spokane, Washington,
L. C. JESSEPH,
Colville, Washington,
Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

In the month of July, 1917, the defendant in error commenced this action in the Superior Court of Stevens County, Washington, against the plaintiff in error and one C. R. Cole to recover $5500.00,

the purchase price of six motor trucks described in the amended complaint. (Tr., p. 2.) Thereafter the cause was removed to the District Court of the United States for the Eastern District of Washington, Northern Division, and came on for trial on the 23rd day of April, 1918, before the court and a jury. The issues are very simple. It is alleged in the amended complaint that the plaintiff sold the motor trucks to the defendants and that the defendants purchased the same for the consideration above mentioned and judgment is asked for the amount of the purchase price. At the conclusion of all of the evidence a motion was made by the defendant in error for leave to amend his complaint so as to state a sale to the plaintiff in error, American Mineral Production Company, which was allowed, plaintiff in error refusing at that time to make any showing of prejudice although invited so to do by the court. (Tr., p. 104.) The defendants answered jointly denying all of the material allegations of the complaint and pleading affirmatively the statute of frauds. (Tr., pp. 4 and 5.) The affirmative defense was denied by a reply. The cause was tried and submitted to the jury upon the theories thus presented by the pleadings and no error is assigned upon the court's instructions.

The testimony shows that in the month of March, 1917, the defendant in error and one John Wilson, doing business under the firm name of Cashmere Truck Line, entered into a contract with the Amer-

ican Mineral Production Company to haul its magnesite ore from its quarries to the town of Valley in Stevens County, Washington. The co-partners entered upon the performance of this contract and continued to operate under the same until the 1st of June, 1917, when Wilson's interest in the co-partnership was taken over in the name of Cole, who at the time was president of the American Mineral Production Company. The hauling was then continued until about the 1st day of July, 1917, after which time the defendant in error did no hauling. On the 25th of June, 1917, Mr. Cole went to the town of Valley, where he met the defendant in error, and negotiations were commenced for the transfer of Helsley's interest in the trucks to the plaintiff in error. These negotiations were continued up to and including the 14th day of July, 1917, when they were finally consummated at the banking house of the Spokane & Eastern Trust Company in the City of Spokane. At that time Mr. Cole, acting as president of the plaintiff in error, and a Mr. T. P. Smith, who was really accountant for the company, purchased Helsley's interest in the trucks for the consideration of $5500.00, the money to be paid on the following Wednesday, July 18, 1917. Immediately after these negotiations were completed the defendant in error returned to Valley, delivered the trucks and his supply of gas and oil to the plaintiff in error, who accepted the same, and thereafter for a period of about one week operated all the trucks in the trans-

portation of magnesite from its quarries to the railroad at Valley, employed and paid the men who operated the trucks, and used the gas and oil which the defendant in error turned over to it. The plaintiff in error also organized what it chose to call a transportation department, having supervision of the operation of the trucks and the hauling of the magnesite, and placed at the head of such department a Mr. Moore, who prior to that time had been an employee of the company. At the time of this transaction the plaintiff in error was under written contract with the defendant in error to deliver to him at least 600 tons of magnesite a week for transportation from its quarries at Valley, Washington, at a price of $2.00 per ton and upon the consummation of this purchase and sale the plaintiff in error was relieved from the burdens of that contract, the company having failed to deliver the required amount of magnesite. (Tr., pp. 24 and 62; Exhibit 1.) The jury returned a verdict in favor of the defendant in error and against plaintiff in error in the sum of $5753.00, being the purchase price with interest, upon which verdict judgment was entered after a motion for a new trial had been overruled by the court.

ARGUMENT.

I.

It is contended by plaintiff in error that no contract or sale with or to the plaintiff in error was shown by the evidence in this case. This conten-

tion cannot be maintained. The defendant in error testified positively that he sold his interest in the trucks to the plaintiff in error for the sum of $5500.00, that he delivered the trucks and the gas and oil on hand into the possession of the plaintiff in error; that the plaintiff in error accepted such possession and operated the trucks and used the gas and oil in the transportation of its magnesite from its quarries to the town of Valley. These facts alone constitute a consummated transaction and passed the title in the trucks from the seller to the buyer. It would not seem necessary to cite authority to sustain this fundamental rule of law but since plaintiff in error has seen fit to raise the question defendant in error directs the attention of the court to the following authorities:

35 *Cyc.* 305 and 322;
Williams v. Ninemire, 23 Wash. 393;
Izett v. Stetson & Post Mill Co., 22 Wash. 300;
Lauber v. Johnson, 54 Wash. 59;
Skinner v. Griffiths & Sons, 80 Wash. 291.

All of the above authorities hold that on facts similar to those in this action the transaction constituted a sale. Furthermore, the trial court instructed the jury as follows:

> "Before the plaintiff can recover in this action, therefore, he must prove two facts: he must prove that a sale was made, as alleged in his complaint, and he must prove that the property was delivered to and accepted by the corporation. If you find from a preponder-

> ance of the testimony offered here that there was a sale, that is, that there was an agreement between the parties on the part of the vendor to sell, and on the part of the purchaser to buy; that is, if you find that their minds met, and that the consideration was agreed upon, and the property was delivered and accepted by the corporation in furtherance of that sale, your verdict will be for the plaintiff for the amount claimed."

No exception was taken by plaintiff in error to this instruction and defendant in error contends it is binding upon all of the parties to this action.

II.

It is contended by plaintiff in error that because the transaction was not reduced to writing on the 14th day of July, 1917, it could not be considered as having been consummated. To sustain this contention authorities are cited on page 13 of the brief for plaintiff in error. We have no quarrel with the rule of law announced in these cases but the rule is not applicable to the case at bar, for the reason that the parties herein had met and discussed and agreed to all the terms and conditions and the transaction was finally consummated in accordance with the agreement then made, the property was delivered, accepted and used by the plaintiff in error to the exclusion of the defendant in error, thereby taking it out of the rule announced in the cases cited.

9 *Cyc.* 282;

Hodges v. Sublett, 91 Ala. 588; 8 So. 800.

Furthermore, it is a well established rule of law that whether there is or is not a sale depends upon the intention of the parties, which intention must be determined by the jury from all of the facts and circumstances surrounding the parties at the time. In the case at bar that question was squarely submitted to and passed upon by the jury as shown by the court's instruction which we have heretofore quoted.

35 *Cyc.* 278.

III.

Plaintiff in error contends that because the written consent of the vendor which had sold the trucks in question under a conditional sale contract was not obtained no title could be passed. If that were true, it was a complete and independent affirmative defense which should have been pleaded or at least the question should have been submitted and brought to the attention of the court and counsel at the time of the trial in order to give us a chance to meet it and the court an opportunity to instruct. Nothing of the kind, however, was done. The brilliant idea first appears in their brief in this case. The case having been tried, submitted and determined upon well-defined theories it is fundamental that the parties will not be permitted to suggest in the appellate court theories or objections not called to the attention of the lower court. Had this question been suggested, defendant in error was prepared by written evidence to establish the fact

beyond any question. On the other hand, the representative of the vendor, Mr. Kover, was present and participating and in close communication with them all the time.

IV.

It is also contended by plaintiff in error that under the law of the State of Washington a corporation cannot enter into a co-partnership. Suffice it to say, that we are not concerned with the question of partnership between the plaintiff in error and Helsley because it is not before the court. The only question to be passed upon here is whether or not Helsley, defendant in error, did not sell his interest in these trucks to the plaintiff in error, the question of partnership not entering into it in the remotest way. If the plaintiff in error did purchase Helsley's interest in the trucks it would not become a co-partnership with him on that account, for the moment it acquired his interest the partnership was entirely dissolved, assuming for the purposes of the argument only, that one had existed. There is no law in this state which precludes a corporation from buying partnership property or the interest of one partner and we are at a loss to understand how this question can have any bearing upon the case in any manner whatsoever.

V.

It is contended by plaintiff in error that Cole, who, it is admitted, was the president of the Amer-

ican Mineral Production Company, was without authority to purchase Helsley's interest in the trucks. (The record in this case is wholly silent with reference to any fact concerning this question.) The plaintiff in error had in its possession its by-laws and such other records as the company had seen fit to make with reference to the power and authority of its officers but it did not see fit to introduce such records in evidence in this action. If it is true, as contended by plaintiff in error, that its president had no authority, how easy it would have been to prove this fact by conclusive evidence. The fact that no such evidence was produced suggests to us that none existed. A discussion of the rules of law with reference to the power and authority of the president of a corporation will be found in:

10 *Cyc.* 903-1069-1087;
Annotated Cases 1913 (D) 643;
Annotated Cases 1913 (E) 846;
Annotated Cases 1916 (A) 474.

The question of the ratification of an unauthorized contract by a corporation is covered by the above citations which become pertinent in this case in view of the fact that plaintiff in error accepted the trucks and operated them to its own advantage.

VI.

It is next contended by plaintiff in error that having alleged a sale to Cole and the American Mineral Production Company jointly, and having

approved a sale to the corporation only, there was a material variance between allegation and proof. Defendant in error respectfully submits that there is no merit in this contention. At the close of plaintiff's case in chief, counsel moved the court separately for each of the defendants, challenging the sufficiency of the evidence and asking for a dismissal of the action as to each. The motion was first made on behalf of the defendant C. R. Cole and after some discussion, which will be found on pages 72 and 76, inclusive, was granted. The same motion was then made for the plaintiff in error and denied. No question of variance was raised by anyone at this time. At the close of all of the evidence in the case plaintiff in error again challenged the sufficiency of the evidence and moved the court for a dismissal, which was denied. (Tr., p. 103.) No question of a variance was made at this time by plaintiff in error. After the case had been argued and the court was ready to instruct he called attention of counsel to the fact that the complaint alleged a joint sale and that perhaps there could be no recovery unless the complaint was amended, so as to eliminate Cole entirely. At that time counsel for defendant in error moved the court for leave to make such an amendment, which was granted. At the same time the following took place:

> "MR. RUSSELL: I object to any amendment at this time. It seems to me that it comes rather late. If they found that Mr. Cole was not liable, then was the time, if any, when they

should have asked leave to change their pleadings. It seems to me that under the conditions here that we should make a motion to dismiss this case for the additional reason that there is a variance between the proof and the pleadings.

THE COURT: That objection was not called to my attention at the time the motion for non-suit was directed to the other defendant. Had it been, I probably would have directed a non-suit to both and allow the amendment. If you can show that you will be prejudiced at this time, except purely as technical defect, I will hear from you.

MR. RUSSELL: We submit it as we have it, and take an exception.

THE COURT: I will allow the amendment."

After having confessed at the time of the trial that it was not in position to show that it would be prejudiced if an amendment was allowed plaintiff in error cannot now raise the question of fatal variance. In conclusion defendant in error directs the attention of the court to the fact which is plainly disclosed by the record in this case, which is this. At the close of the plaintiff's case in chief on motion to that effect the defendant Cole was dismissed from the action because the proof showed that a sale had been made to the plaintiff in error and not to Cole individually. Immediately thereafter plaintiff in error proceeded to prove to the jury by the interrogatories of Cole and Smith that the sale was made in fact to Cole. It is respectfully submitted that the plaintiff in error in this case cannot blow its hands to make them warm and

its soup to make it cool. If the sale was not made to Cole then it was made to the plaintiff in error and we think this fact is abundantly established by the record before this court. In fact Cole as an individual had no use whatever for the trucks in controversy but the plaintiff in error did have use for them and did use them. The record also shows that counsel for the American Mineral Production Company were paid by the company for services rendered in connection with this transaction and the fact that Wilson's interest in the trucks had been taken in the name of Cole is explained by the further fact that Cole took most of the mineral bearing properties owned by the plaintiff in error in his own name. By purchasing Helsley's interest in the truck line the plaintiff in error got from under its contract to provide 600 tons of ore a week for transportation at $2.00 per ton. On the entire record it is respectfully submitted that the judgment of the trial court should be affirmed.

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L. C. JESSEPH,
Colville, Washington,
Attorneys for Defendant in Error.

No. 3186

United States
Circuit Court of Appeals
For the Ninth Circuit

HULET M. WELLS, SAM SADLER,
MORRIS PASS and JOE PASS,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

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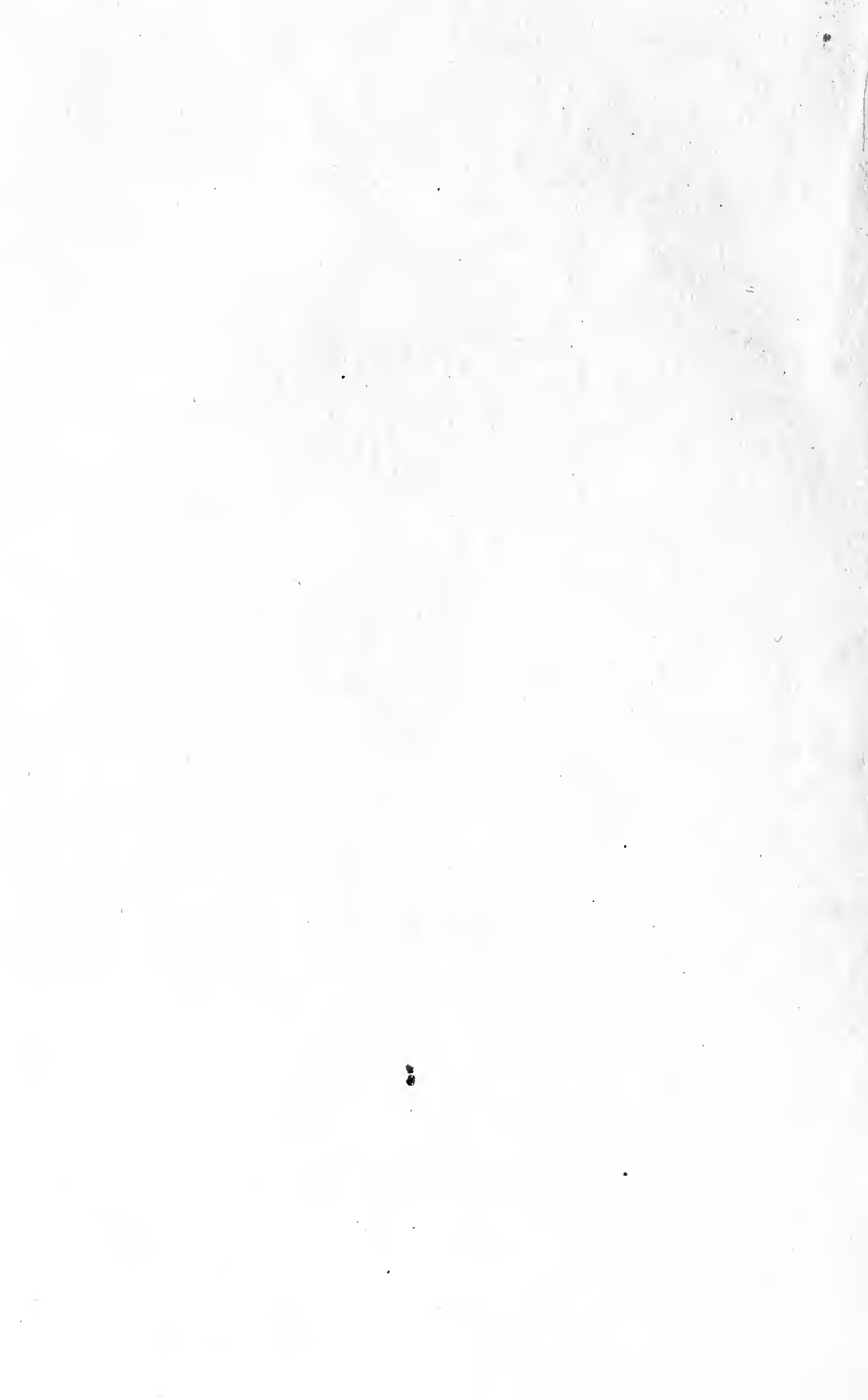

No.

United States Circuit Court of Appeals

For the Ninth Circuit

HULET M. WELLS, SAM SADLER,
MORRIS PASS and JOE PASS,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

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United States District Court, Western District of Washington, Northern Division.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, et al.,

Defendants.

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United States District Court, Western District of Washington, Northern Division.

May Term, 1917.

No. 3797.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
HULET M. WELLS, SAM SADLER,
MORRIS PASS, and JOE PASS,
Defendants.

Indictment.

The United States of America,
Western District of Washington,
Northern Division.—ss.

The grand jurors of the United States of America, duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

COUNT I.

That Hulet M. Wells, Sam Sadler, Morris Pass and Joseph Pass, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the twenty-fifth day of April, A. D. One Thousand Nine Hun-

dred and Seventeen, did wickedly, maliciously, corruptly, wilfully, knowingly, unlawfully and feloniously combine, conspire, confederate and agree together, and one with another, and together and with divers and sundry other persons whose names are to the grand jurors unknown, to oppose by force the authority of the United States, and by force to prevent, hinder and delay the execution of a law of the United States, that is to say, that the said mentioned Hulet M. Wells, Sam Sadler, Morris Pass and Joseph Pass, hereinafter referred to as "Defendants," did wilfully, knowingly, unlawfully and feloniously combine, conspire, confederate and agree together and with divers and sundry other persons to the grand jurors unknown, by force to prevent, hinder and delay the execution of the joint resolution of Congress of the United States made and approved on the sixth day of April, A. D. One Thousand Nine Hundred and Seventeen, then and there declaring a state of war to exist between the United States and the Imperial German Government, and directing and authorizing the President of the United States to employ the entire military and naval forces of the United States and the resources of the government to carry on war against the Imperial German Government; and to then and there oppose by force the authority of the United States and the authority of the President of the United States in carrying into force and effect the

provisions of the laws then existing which related to the armed military and naval forces of the United States; and to then and there by force prevent, hinder and delay the execution of such acts of Congress enacted after the adoption of said resolution declaring war between the United States and the Imperial German Government, hereinabove referred to, for the purpose of carrying into execution the plan and purpose of said resolution, it then and there being the purpose and intention of the said defendants, and each of them, together with such other persons as they might, or could, induce, incite and encourage to co-operate with them in their plan, and to join their said conspiracy to oppose by force the authority of the United States, and to prevent, hinder and delay the execution of the said joint resolution of Congress declaring war hereinabove referred to, together with such other laws as then existed or as might thereafter be enacted in pursuance of said joint resolution of Congress declaring war; and it then and there was the further purpose, plan and object of the said defendants, and each of them, to prevent by force the proper organization of armed military and naval forces of the United States, and the proper disposition of said force under and by virtue of the authorities of the United States in conducting said war so declared and resolved for by the said Congress of the United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object thereof, the said Hulet M. Wells, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the tenth day of May, A. D. One Thousand Nine Hundred and Seventeen, did wilfully, knowingly, unlawfully and feloniously engage, direct, order, employ and hire the Trade Printery, which was then and there a printing establishment in the City of Seattle, a more particular description thereof being to the grand jurors unknown, to print and cause to be printed many copies, the exact number of which is to the grand jurors unknown, of a certain circular, pamphlet, print and leaflet, hereinafter referred to as the "No-Conscription Circular," and which said circular is in words and figures as follows, to-wit:

NO CONSCRIPTION
NO INVOLUNTARY SERVITUDE
NO SLAVERY.

"Neither Slavery, nor INVOLUNTARY SERVITUDE, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the Unitel States or any place subject to their jurisdiction."

The above is a part of the organic Constitution

of the United States. The President and Congress have no authority to set it aside. That can only be done by a majority vote of the Legislature of three-fourths of the separate states. For the President and Congress to do it, is to usurp the powers of autocrats and if unresisted means the abandonment of democracy and the destruction of the Republic.

We, signing this, are native born citizens, within the age limit set for the first compulsory draft. They will make an army of us and send us to compel you to enter the second draft, and some more of you to enter the third draft and so on until freedom is dead. Wake up! Stand by us now, for when we have become an army we will have ceased to think and we will shoot you if told to shoot you! Just so it is expected that we will shoot and kill our brothers in other lands, and that we will die to restore the rapidly vanishing values to the investments of Wall Street bankers escaping service themselves—a plutocracy whose good fortunes we do not share, but for which we have suffered enough.

Resist! Refuse! Don't yield the first step toward conscription. Better to be imprisoned than to renounce your freedom of conscience. Let the financiers do their own collecting. Seek out those who are subject to the first draft! Tell them that we are refusing to register or to be conscripted and to stand with us like men and say to the mas-

ters: "Thou shalt not Prussianize America!"

We are less concerned with the autocracy that is abroad and remote than that which is immediate, imminent and at home. If we are to fight autocracy, the place to begin is where we first encounter it. If we are to break anybody's chains, we must first break our own, in the forging. If we must fight and die, it is better that we do it upon soil that is dear to us, against our masters, than for them where foreign shores will drink our blood. Better mutiny, defiance and death of brave men with the light of the morning upon our brows, than the ignominy of slaves and death with the mark of Cain, and our hands spattered with the blood of those we have no reason to hate.

SEATTLE BRANCH NO CONSCRIPTION LEAGUE, P. O. Box 225.

"Where is it written in the constitution—that you may take the children from their parents—and compel them to fight the battles of Any War in which the folly or the wickedness of the government may engage?"

(Union Label.)

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of the said unlawful conspiracy and in pursuance of and to effect the objects thereof, the said Hulet M. Wells did on the tenth day of

May, A. D. One Thousand Nine Hundred and Seventeen, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, wilfully, knowingly, unlawfully and feloniously read, correct, approve and "OK" the said printed circular hereinabove referred to.

And the grand jurors aforesaid, upon their oats aforesaid, do further present: That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object thereof, the said Hulet M. Wells on the twenty-third day of May, A. D. One Thousand Nine Hundred and Seventeen, at Seattle, within the Northern Division of the Western District of Washington and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously introduce a resolution at a meeting in the Labor Temple of said City of Seattle on the evening of said day, which said resolution was of the following language and tenor, to-wit:

"WHEREAS, the U. S. Government, over the repeated and emphatic protests of organized labor, is attempting to conscript men for service in a foreign war, and powerful forces are at work to fill the places of such conscripted citizens with coolie labor; and

"WHEREAS, there are among our people many classes of conscientious objectors, including

those who oppose all war, those who oppose all international wars except to repel invasion, those who believe that this enforced slaughter of our young men is not based upon a worthy cause, those who do not believe in abandoning all American traditions by sending an invading army overseas, those who have religious scruples, and those whose ties of blood and birth would compel them to either resist conscription or to crush with fratricidal brutality the best impulses of the human heart; and

"WHEREAS, the co-operation of the organized workers, especially in mechanical, shipbuilding and transportation industries is essential to the prosecution of the war; and

"WHEREAS, no injury to our country could result from the conclusion of an immediate peace,.

"THEREFORE, it is apparent that the organized workers have it in their power to stop the war, and if it is to be continued we demand of the Government, (1st) exemption from military service of all those who have conscientious objections to the war, and (2d) that there shall be absolutely no relaxation of the present restrictions on Oriental immigration."

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of the said unlawful conspiracy and in pursuance of an to effect the object thereof, the said Hulet M. Wells, Sam Sadler, and other per-

sons to the grand jurors unknown, on the eleventh day of May, A. D. One Thousand Nine Hundred and Seventeen, in a room in the Epler Block, in the City of Seattle, King County, Washington, in said division and district, and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously distribute and cause to be distributed said "No Conscription" circular, the terms of which said print, pamphlet and circular are hereinabove described and set forth, and are by allegation made a part of this overt act, to and among numerous persons to the grand jurors unknown; contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That Hulet M. Wells, Sam Sadler, Morris Pass and Joseph Pass, hereinafter referred to as defendants, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the twenty-fifth day of April, One Thousand Nine Hundred and Seventeen, did wickedly, maliciously, corruptly, wilfully, knowingly, unlawfully and feloniously combine, conspire, confederate and agree together and one with the other, and together and with divers and sundry other persons whose names are to the grand jurors

unknown, by force to prevent, hinder and delay the execution of certain laws of the United States, to-wit: (1) the Joint Resolution of the Senate and House of Representatives, dated April 6, 1917, "That the state of war between the United States and the Imperial German Government which has been thrust upon the United States is hereby formally declared," and thereby authorizing and directing the President to use and employ all of the military and naval forces of the United States, and all the resources of the Government thereof in the prosecution of said war; (2) the Act of Congress approved June 3, 1916, and entitled "An Act for Making Further and More Effectual Provision for the National Defense, and for other purposes," special reference being had to Sections 57, 59 and 111 of said Act; and (3) Section 4 of the Act of Congress approved January 21, 1903, entitled "An Act to promote the efficience of the Military and for other purposes," as amended by Section 3 of the Act of Congress approved May 27, 1908, entitled "An Act to further amend the Act entitled, 'An Act to promote the efficiency of the Militia, and for other purposes,' approved January 21, 1903," it then and there being the purpose and intention of the said defendants and each of them, together with such other persons as they might, or could induce, incite and encourage to co-operate with them in their plan, and to join their said conspiracy, by force to

prevent, hinder and delay the duly authorized officers, agents and representatives of the United States from putting into effect and executing the said laws hereinabove mentioned and from calling forth and bringing into the military service of the United States, persons subject and liable to service thereunder, under the provisions of said laws and to prevent, hinder and delay by force the mobilization, organization, control, direction and disposition of the armed military and naval forces of the United States in conducting said war against the Imperial German Government.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object thereof, the said Hulet M. Wells, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the tenth day of May, A. D. One Thousand Nine Hundred and Seventeen, did wilfully, knowingly, unlawfully and feloniously engage, direct, order, employ and hire the Trade Printery, which was then and there a printing establishment in the City of Seattle, a more particular description thereof being to the grand jurors unknown, to print and cause to be printed many copies, the exact number of which is to the grand jurors unknown, of a certain circular, pamphlet, print and leaflet, hereinafter re-

ferred to as the "No Conscription" circular, and which said circular is in words and figures as follows, to-wit:

NO CONSCRIPTION
NO INVOLUNTARY SERVITUDE
NO SLAVERY

"Neither Slavery, nor INVOLUNTARY SERVITUDE, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

The above is a part of the organic Constitution of the United States. The President and Congress have no authority to set it aside. That can only be done by a majority vote of the Legislatures of three-fourths of the separate states. For the President and Congress to do it, is to usurp the powers of autocrats and if unresisted means the abandonment of democracy and the destruction of the Republic.

We, signing this, are native born citizens, within the age limit set for the first compulsory draft. They will make an army of us and send us to compel you to enter the second draft, and some more of you to enter the third draft and so on until freedom is dead. Wake up! Stand by us now, for when we have become an army we will have ceased to think and we will shoot you if told to shoot you! Just so it is expected that we will shoot and kill our brothers in other lands and that we will

die to restore the rapidly vanishing values to the investments of Wall Street bankers escaping service themselves—a plutocracy whose good fortunes we do not share, but for which we have suffered enough.

Resist! Refuse! Don't yield the first step toward conscription. Better to be imprisoned than to renounce your freedom of conscience. Let the financiers do their own collecting. Seek out those who are subject to the first draft! Tell them that we are refusing to register or to be conscripted and to stand with us like men and say to the masters: "Thou shalt not Prussianize America!"

We are less concerned with the autocracy that is abroad and remote than that which is immediate, imminent and at home. If we are to fight autocracy, the place to begin is where we first encounter it. If we are to break anybody's chains, we must first break our own, in the forging. If we must fight and die, it is better that we do it upon soil that is dear to us, against our masters, than for them where foreign shores will drink our blood. Better mutiny, defiance and death of brave men with the light of the morning upon our brows, than the ignominy of slaves and death with the mark of Cain, and our hands spattered with the blood of those we have no reason to hate.

SEATTLE BRANCH NO CONSCRIPTION LEAGUE, P. O. Box 225.

"Where is it written in the constitution—that you may take the children from their parents—and compel them to fight the battles of Any War in which the folly or the wickedness of the government may engage."

(Union Label.)

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object thereof, the said Hulet M. Wells did on the tenth day of May, A. D. One Thousand Nine Hundred and Seventeen, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, wilfully, knowingly, unlawfully and feloniously read, correct, approve and "OK" the said printed circular hereinabove referred to.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object thereof, the said Hulet M. Wells on the twenty-third day of May, A. D. One Thousand Nine Hundred and Seventeen, at Seattle, within the Northern Division of the Western District of Washington and within the jurisdiction of this court, did wilfully, knowingly, unlawfully and feloniously introduce a resolution at a meeting in the Labor Temple of

said City of Seattle on the evening of said day, which said resolution was of the following language and tenor, to-wit:

"WHEREAS, The U. S. Government, over the repeated and emphatic protests of organized labor, is attempting to conscript men for service in a foreign war, and powerful forces are at work to fill the places of such conscripted citizens with coolie labor; and

"WHEREAS, That there are among our people many classes of conscientious objectors, including those who oppose all war, those who oppose all international wars except to repel invasion, those who believe that this enforced slaughter of our young men is not based upon a worthy cause, those who do not believe in abandoning all American traditions by sending an invading army overseas, those who have religious scruples, and those whose ties of blood and birth would compel those to either resist conscription or to crush with fratricidal brutality the best impulses of the human heart; and

"WHEREAS, The co-operation of the organized workers, especially in mechanical shipbuilding and transportation industries is essential to the prosecution of the war; and

"WHEREAS, No injury to our country could result from the conclusion of an immediate peace,

"THEREFORE, It is apparent that the organized workers have it in their power to stop the

war, and if it is to be continued we demand of the Government, (1st) exemption from military service of all those who have conscientious objections to the war, and (2nd) that there shall be absolutely no relaxation of the present restrictions on Oriental immigration.''

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object thereof, the said Hulet M. Wells, Sam Sadler, and other persons to the grand jurors unknown, on the eleventh day of May, A. D., One Thousand Nine Hundred and Seventeen, in a room in the Epler Block, in the City of Seattle, King County, Washington, in said division and district, and within the jurisdiction of this court, aid wilfully, knowingly, unlawfully and feloniously distribute and cause to be distributed said ''No Conscription'' circular, the terms of which said print, pamphlet and circular are hereinabove described and set forth, and are by allegation made a part of this overt act, to and among numerous persons to the grand jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CLAY ALLEN,
United States Attorney.

BEN L. MOORE,
Assistant United States Attorney.

Indorsed: Indictment for vio. Sec. 37 P. C. to vio. Act of Apr. 6, 1917, Act of June 3, 1916, and Act of Jan. 21, 1903, as amended. A True Bill. F. C. Harper, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and filed in the U. S. District Court, Oct. 31, 1917, Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, et al.,

Defendants.

Arraignment and Plea.

Hulet M. Wells, Sam Sadler, Morris Pass, Joseph Pass,

Now on this 26th day of November, 1917, the above named Defendants come into open Court for arraignment, counsel not being present, and here and now answer to their names as given. The indictment is read to them and they enter pleas of not guilty to the charge in the indictment herein against them. Defendants' bail is fixed and they are allowed to go on bail in cause No. 3671, until bail is fixed. At 2:00 P. M. defendants Morris Pass and Joe Pass appear in open Court, counsel not present, and each enters his plea of not guilty to the charge in the indictment herein against him.

Journal 6, page 314.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, et al.,

Defendants.

Trial.

Now on this 19th day of February, 1918, this cause comes on for trial in open Court, the Plaintiff being represented by C. L. Reames, Special Assistant Attorney General, and Ben L. Moore, Assistant U. S. Attorney, and the defendants present in their own proper persons and represented by W. R. Bell and Jacob Kalina. Whereupon both sides being ready the following persons are examined and qualify as petit jurors, as follows: A. A. Keenan, Carl Jorgenson, Walter S. Milnor, I. Cooper, W. F. Howe, F. L. Bartlett, Fred Lyke, John E. Meldal, W. A. Hannan, Wm. McPhearson, Dana Brown and C. N. Valentine, twelve good and lawful men duly empaneled and sworn. The Court orders that the jury as empaneled and sworn be kept together in charge of Bailiff and not allowed to separate during the trial and that Marshal provide meals and lodging. Opening statement of plaintiff is made to the jury. Witnesses Mrs. Nell R. Smith, Wm. R. Saunders and Geo. B. Lisman are sworn and examined on behalf of the Plaintiff and exhibits 1 to 5 admitted. The jury is cautioned and retire in charge of bailiffs and excused until

10:00 A. M. tomorrow. Bailiffs E. R. Tobey and J. Luckenbel are sworn in charge of jury.

Journal 6, page 373.

In the District Court of the United States for the Western District of Washington.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOSEPH PASS,

Defendants.

Verdict.

We, the jury in the above entitled cause, find

Defendant Hulet M. Wells is guilty.

Defendant Sam Sadler is guilty.

Defendant Morris Pass is guilty.

Defendant Joseph Pass is guilty.

WALTER S. MILNOR, Foreman.

Indorsed: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 21, 1918. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, et al.,

Defendants.

Sentence—Hulet M. Wells.

Comes now on this 18th day of March, 1918,

the defendant Hulet M. Wells into open Court for sentence and being informed by the Court of the Indictment herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as before he hath said. Wherefore, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of the crime of violation of Sec. 37 P. C. to vio. Act Apr. 6, 1917, Act June 3, 1916, and Act Jan. 21, 1903, and that he be punished by being confined in the United States Penitentiary at McNeil Island, Washington, or in such other prison as may hereafter be provided for persons convicted of offenses against the law of the United States, for the period of two years or until he shall be otherwise discharged by law, whereupon defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree Book No. 2, page 232.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, et al.,

Defendants.

Sentence—Sam Sadler.

Comes now on this 18th day of March, 1918, the

defendant Sam Sadler into open Court for sentence, and being informed by the Court of the indictment herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as before he hath said. Wherefore by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant Sam Sadler is guilty of the crime of violation of Sec. 37 P. C. to violate Act April 6, 1917, Act June 3, 1916, and Act. Jan. 21, 1903, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Washington, or in such other place as shall be hereafter provided for the confinement of persons convicted of offense against the laws of the United States, for the period of two years, or until he shall be otherwise discharged by law, whereupon defendant is hereby remanded into the custody of the United States Marshal, to carry this sentence into execution.

Judgment and Decree Book No. 2, page 232.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, et al.,

Defendants.

Sentence—Morris Pass.

Comes now on this 18th day of March, 1918, the

defendant Morris Pass into open Court for sentence, and being informed by the Court of the indictment herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as before he hath said. Wherefore by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant Morris Pass is guilty of the crime of violation of Sec. 37 P. C. to violate Act April 6, 1917, Act June 3, 1916, and Act. Jan. 21, 1903, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Washington, or in such other place as shall be hereafter provided for the confinement of persons convicted of offense against the laws of the United States, for the period of two years, or until he shall be otherwise discharged by law, whereupon defendant is hereby remanded into the custody of the United States Marshal, to carry this sentence into execution.

Judgment and Decree Book No. 2, page 233.

No. 3797.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HULET M. WELLS, et al.,
Defendants.

Sentence—Joseph Pass.

Comes now on this 18th day of March, 1918, the

defendant Joseph Pass into open Court for sentence, and being informed by the Court of the indictment herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as before he hath said. Wherefore by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant Joseph Pass is guilty of the crime of violation of Sec. 37 P. C. to violate Act April 6, 1917, Act June 3, 1916, and Act Jan. 21, 1903, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Washington, or in such other place as shall be hereafter provided for the confinement of persons convicted of offense against the laws of the United States, for the period of two years, or until he shall be otherwise discharged by law, whereupon defendant is hereby remanded into the custody of the United States Marshal, to carry this sentence into execution.

Judgment and Decree Book 2, page 233.

United States District Court, Western District of Washington, Northern Division.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOSEPH PASS,

Defendants.

Order Extending November Term.

This cause coming on to be heard upon the application of counsel for the Defendants hereto for an order in the above entitled cause extending the November term of the above entitled Court and it appearing that said application should be granted;

IT IS ORDERED AND DECREED that the 1917 November term of the above entitled Court holden in the Northern Division of said district be and the same hereby is extended in the above entitled cause from and after its expiration on Monday, May 8th, 1918, to and including the 5th day of June, 1918, for the purpose of settling, allowing and filing defendants' Bill of Exceptions in said entitled cause, which has heretofore been prepared and served on plaintiff.

AND IT IS FURTHER ORDERED that the time in which the Bill of Exceptions may be settled, allowed and filed under the rules of the said Court is hereby extended to conform to the time extending

the November term of said Court.

DONE IN OPEN COURT this 6th day of May, 1918.

JEREMIAH NETERER,
United States District Judge.

O. K.—WILSON R. GAY and
WINTER S. MARTIN,
Attys. for Defts.

Indorsed: Order Extending November Term. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 6, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 3797.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOSEPH PASS,
Defendants.

Order Extending Term and Permitting Filing of Bill of Exceptions.

This cause coming on to be heard upon the application of the attorneys for the defendants in the above entitled cause for an order for the further extension of the November term 1917 of the above entitled court, in order to permit settling and filing bill of exceptions in said cause and it appearing to the court that said order should be entered, it is by

the court ORDERED AND DECREED that the 1917 November term of the above entitled court holden in the Northern Division of said District be and the same hereby is further extended in the above entitled cause from and after the 5th day of June, 1918, to and including the 17th day of June, 1918, for the purpose of settling, allowing and filing defendants' bill of exceptions in said entitled cause; and

IT IS FURTHER ORDERED that the time in which the bill of exceptions may be settled, allowed and filed under the rules of said court is hereby extended to conform to the further extension of the term time as herein named.

Done in Open Court this 3rd day of June, 1918.

JEREMIAH NETERER,
U. S. District Judge.

Indorsed: Order Extending Term and Permitting Filing of Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, June 3, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3797.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HULET M. WELLS, et al.,
Defendants.

Hearing In Re Settlement Bill of Exceptions.

Now on this day this cause comes on for hear-

ing in re settlement Bill of Exceptions, Ben L. Moore appearing for the Plaintiff, and Winter S. Martin for Defendant. Whereupon settlement is made to page 26, line 25, inc., and further time for settlement continued from June 17 to 24th, inclusive, and November Term, 1917, extended from June 17th to and including June 24, 1918, for said purpose.

Dated June 14, 1918.

Journal 7, page 1.

United States District Court, Western District of Washington, Northern Division.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOSEPH PASS,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that on the trial of this cause in this Court at the November Term, A. D. 1917, the Honorable Jeremiah Neterer, presiding, when the following proceedings were had, to-wit: A jury was impaneled and sworn according to law, and thereupon the United States, plaintiff, to sustain the issue on its part offered the testimony of the following witnesses and certain exhibits as its evidence in chief:

NELL R. SMITH, who was offered as plain-

tiff's first witness, testified that she was the secretary of the Trade Printery, 88 Jackson Street, Seattle; that she kept the books and records of that concern and identified the cash book containing certain entries in May , 1917, relating to the printing of 20,000 circulars ordered for the "No Conscription League," Seattle Branch, as plaintiff's Exhibit I. This entry contained reference to two cash items of $10.00 each, one on May 7th and one on May 11th, for the payment of certain "No Conscription League" circulars. She also offered the Job Register of said concern as plaintiff's Exhibit II, containing the entry, "No Conscription League," Seattle Branch, 20,000 circulars, $20.00, delivered on May 11th, invoiced May 16. She also identified an envelope containing the manuscript copy of the circular, which this company printed at the request of the defendant, Hulet M. Wells, which was identified as Plaintiff's Exhibit III. She also identified the proof copy of this same circular as plaintiff's Exhibit IV. She next offered the invoice containing the entry, Seattle Branch No Conscription League, 20,000 circulars, $20.00, under date of May 11, 1917, as plaintiff's Exhibit V. Witness testified that she left this proof with the defendant, Wells, at the City Light Department Building, and made these book entries referred to. They were offered in evidence by the Government as Exhibits I, II, III, IV and V, respectively, and same were admited.

WILLIAM R. SAUNDERS was next offered as a witness and testified that he was President and

Manager of the Trade Printery in May, 1917, who also identified the Exhibits referred to. No objections was offered to these exhibits.

GEORGE P. LISTMAN was next offered by the Government. He testified that he was superintendent of the Mechanical Department of the Trade Printery in May, 1917, and was familiar with the particular job of printing ordered by the "No Conscription League," covered and identified by the several exhibits referred to. He testified that defendant, Wells, left this printing job with the Trade Printery and paid him $10.00 on account, paying the balance on delivery. Witness sent the proof to Wells at the City Light Department. It was returned by Wells corrected and O. K'd. The proof bore the particular notation, "O. K. with corrections, H. W." With also the words and figures, "P. O. Box 225." "Corrected proof. Would like circulars for Friday evening, Wells." Witness testified that the Union Label number, which serves to identify the shop turning out the work, was left off at the suggestion of Mr. Wells. Defendants admitted at this point that Wells wrote the notations and corrections on Plaintiff's Exhibit IV, o.k.ing and approving the proof.

The Government next called J. E. FRIERMOOD, who testified that he was present on May 11th at a meeting held in the Epler Building in the City of Seattle. He testified that this room had a board partition which divided it partially into two rooms. He went to this room shortly before eight o'clock in the evening. That there were possibly

thirty people present. He saw the defendants Wells and Sadler at this meeting. The matter of the then proposed National Draft Act or Conscription Law was discussed at some length. It was stated generally that the time to get action was then and not after it passed. He saw some circulars there similar to plaintiff's Exhibit IV, although these were in the finished form as distinguished from the proof with the O. K. on it as contained in Exhibit IV. He then identified Plaintiff's Exhibit VI as the finished "No Conscription" circular, which is identical with that set out in the indictment. Whereupon the finished printed "No Conscription" circular identical with that described in the indictment was offered and admitted in evidence as Plaintiff's Exhibit VI. This witness observed a big bundle of these circulars in the room. There was some discussion among those present about distributing these circulars on the following Sunday Morning early, alloting a certain number to the various precincts in the City. Witness observed a precinct map of the City on the wall of the room. A number of the persons present took these circulars. Witness could not remember what was said by Wells or Sadler except that whatever they said conformed in a general way to the discussion indulged in by the Assembly. This witness was not able to identify Morris Pass. There was some talk about vouching for or identifying the various members of the Assembly

in order that the meeting might be assured that the matter of the distribution of these circulars would not be told of or spoken about until they had been distributed on the following Sunday Morning. Brother Wells vouched for the witness. Someone suggested that the door ought to be watched or guarded, but whether it was in fact done, witness could not recall. This witness remembered particularly that Mr. Wells scoffed at the idea of the necessity of secrecy. Witness was then asked by counsel for the defence if Mr. Wells said there was not any cause for secrecy because there wasn't anything being done or contemplated that was improper or unlawful. Witness answered that he could not recall and that he was not sure on that point. Witness stated on Cross Examination that it was the purpose of the meeting to oppose the adoption of the Draft Act before it became a law and not afterwards. There were two delegates from the Central Labor Council present. There was talk among those present of reaching the Washington representative in Congress, so that they could be induced to use their efforts to oppose the pending Conscription Act. The purpose of circulating the paper or pamphlet, referred to as Exhibit VI, to-wit, "No Conscription" circular was to arouse a public sentiment against the passage of the law and not against its enforcement after it became a law. Witness was asked the following questions on Cross Examination

and made the answers quoted:

Q. Was there any suggestion by anyone at that meeting—Mr. Wells or anybody else—that force should be used then or at any time in reference to the Conscription Bill or the law which might be enacted thereafter?

A. No, I don't think so.

Q. Not a word of force mentioned by anyone?

A. I don't think so.

Q. Not even a suggestion of that?

A. No, I don't think there was.

Q. They talked about the idea of reaching the members in Congress, didn't they?

A. That was the opinion that I gathered.

Q. To reach the representatives of this State in Congress so that they would use their efforts in Congress to oppose this pending Act of Conscription—that was the sense of the meeting, wasn't it?

A. Yes.

Q. And the purpose as disclosed—the purpose of circulating this paper or pamphlet—was to arouse a public sentiment against the passage of the law, wasn't it?

A. That was the intention.

Q. And not against the enforcement of it after it became a law?

A. No.

Witness on Re-Direct Examination stated that a communication had been sent to the Central Labor

Council asking the Council's co-operation in some sort of a demonstration against the High Cost of Living, and witness attended this meeting for that purpose. Witness stated that defendant Sadler stated that they could take some of these circulars up to the Labor Temple where they could be obtained by others on Saturday evening; but this witness on Re-Direct Examination could not state that Sadler had anything to do with the distribution of these circulars other than the talk at the meeting.

DAVID LAVINE was next called as a witness for the plaintiff, who testified that he was a director of the Socialist Paper named, "The Call." He knew defendants Wells and Sadler. He attended this meeting on the 11th day of May, 1917. He arrived at the meeting about eight o'clock. When he got there the rooms were full. There must have been fifty people present according to his recollection. He observed the defendants Wells and Sadler there and observed the "No Conscription" literature (Plaintiff's Exhibit VI) on the table. He picked one of these circulars up and identified it as similar to Exhibit VI. There was quite a general discussion that night relating to these circulars. All the members present joined in the discussion and he could not remember what part Sadler or Wells took as everybody said something. This witness observed the Socialist Precinct Map on the wall and knows that the map was referred to in the general dis-

cussion concerning distribution. Some reference was made during the evening about the attempts on the part of various people to break up meetings of that character and it was suggested that the best thing to do would be to vouch for each other to find out who was there. Reference was made to patriotic organizations and hoodlums as being likely to break up the meeting. On Cross Examination witness stated that the discussion took the form of opposing the then pending Conscription Bill before it was passed by Congress. Witness was asked this question on Cross Examination by defendants' counsel:

Q. Was there any suggestion by anybody at that meeting that force should be resorted to in connection with this Conscription Bill that was pending in Congress?

A. No, I am pretty sure of that because I am very much opposed to force. I would certainly have protested if there had been anything said upon it.

This witness was positive that Joe Pass was not there but could not tell whether defendant Morris Pass was there or not. This witness came to the meeting under the belief that the Young Peoples Socialist League was about to meet. This witness did not know who prepared the "No Conscription" circular referred to as Plaintiff's Exhibit VI.

G. M. WELTY was next called as a witness on behalf of the Government. He knew the defendants

Wells and Sadler, observed these two defendants at the meeting, also the witness, Friermood. Witness stated that he was appointed by Mr. Duncan, the Secretary of the Central Labor Council, to act on a committee with a Mr. Spencer and Mr. Friermood to meet at the Epler Block for the purpose of holding a demonstration or parade, or considering the advisability of doing so against the High Cost of Living. Witness identified Exhibit VI as a circular similar to a number which he observed in the room that night. There was a general discussion about this circular. Two bundles were brought in and put on a table. They were opened up and the circulars distributed to those who requested them. Defendant Wells stated that he could not be at the Labor Temple the following evening (Saturday) and Sadler volunteered to be there and give them out. Witness stated that they vouched for each other and there was some discussion about appointing Sergeants-at-Arms, but didn't know whether anyone was appointed to that office, because of his position in the room. Witness referred to the partition between the rooms and stated that he could not see what was going on at the door. Defendant Wells wanted each one to take a bundle of these circulars for distribution in his precinct. Witness on Cross Examination stated that it was the sense of the meeting that they did not want to be interrupted. It was brought out in discussion that there

might be spotters around. That was the object of vouching for each person. Witness did not recall seeing the defendants Morris or Joe Pass. He would not know if they had been there. Witness was asked by counsel for the defense this question:

J. The sense of that meeting was that they should act in reference to this proposed Conscription Law at that time and not after it became a law?

A. The law had not been enacted.

Q. And the discussion was to take such measures as would be possible and legal to prevent that bill becoming and enacted into a law? That was the sense of the discussion, was it not?

A. I don't know whether it was the sense to do it legally, but at least to defeat that law if possible.

Witness did not recall the matter of reaching the various Members of Congress. Witness could not state whether Wells or Sadler took any of the circulars away with them. He knew that there was talk about the distribution, but knew nothing about the actual distribution or how it was done or handled.

JAMES A. DUNCAN was next called by the Government. He testified that he was Secretary of the Central Labor Council; that on the 30th day of April, 1917, he attended a meeting in the Good Eats Cafeteria in the evening. He knew Wells and his wife and testified that they and Miss Strong were present. He could not recall anyone else as being

present although there was quite a number of people. There was a general discussion in the matter of the publication of Anti-Conscription literature. In this discussion it was recognized as necessary to do something to offset newspaper work that was being done to spread sentiment in favor of conscription. It was felt that a circular or something should be gotten out. This meeting occurred between 6:00 and 7:30 in the evening. The matter of the distribution of these circulars was not talked while the witness was there. The discussion was confined to the preparation of a pamphlet or circular. Mr. Wells was asked to prepare and submit a pamphlet or circular to a committee for approval or rejection. Witness remembered that Wells stated that he was extremely busy and did not have any time to give to the preparation of the circular. He was finally asked whether if they decided to get out his pamphlet he would attend to the matter of printing it, because of his familiarity with printing matters, and heard Wells reply that in all probability he would not mind doing that. He was not there when any collection was taken to defray printing expenses; and did not recall that either of the defendants Morris or Joe Pass were there. He testified that he was present on the 23rd day of May at a meeting of the Central Labor Council and identified plaintiff's Exhibit VII, as a resolution which was presented to the Council by Mr. Wells, stating that

it had been pending before the Council for some three weeks prior to that time. This resolution was offered in evidence and thereupon Mr. Bell objected upon the ground that it was immaterial and would not tend to prove any issue in the case. This resolution was admitted as plaintiff's Exhibit VI over Mr. Bell's objection and exception noted. On Cross Examination by defendant's counsel this witness explained that there had been two separate matters of discussion presented about two meetings prior to May 23, 1917, to-wit, the matter of opposing Conscription and also the Importation of Coolie Labor. The Central Labor Council in this previous meeting held about two weeks before that of May 23rd combined or consolidated the two subjects and set them down as the special order of business for May 23rd, the said two subjects to be acted upon jointly as one and the same. At this meeting, to-wit, that of April 30th, there was considerable discussion about the Conscription Act, the sense of the meeting being that something should be done to offset agitation in the Press in favor of Conscription. It was suggested that a protest meeting be held. Witness thought that some of those present at the meeting had gotten in touch with members of the Congressional Delegation. The witness was asked this question:

Q. What was said at that time about the desirability of opposing or of taking action before

the law became effective, Mr. Duncan?

A. Why, it was felt right through those meetings that now was the time to act, that it was useless to take action after the thing was done.

And this was Mr. Wells' attitude. He was asked this further question:

Q. Was there any suggestion by Mr. Wells or by anybody at that meeting about the use of force, either before or after the Act became a law?

A. None whatever.

He was asked if he knew who prepared the circular and replied that he did not. He stated that his impression was that Mr. Wells did oversee the matter of printing it. He was asked these further questions and made the answers set forth:

Q. Now at this meeting at the Labor Temple was there any talk or suggestion by anybody that force should be used to effect the repeal of the Conscription Law?

A. Not one word or one suggestion. It would not be stood for for one moment.

Q. Was the sense of this meeting at the Good Eats Cafeteria and the sense of the meeting at the Labor Temple against the Conscription Act or against the war itself?

A. Against the Conscription Act.

This witness stated that they opposed the war right to the last ditch until war was declared, then when the Draft Law had passed that he and the

other members of the meeting felt they had a right to ask for its repeal as a law most unwise. The repeal was advocated in an orderly way, and that the preparation of the circular was agreed upon for the purpose of arousing legal opposition to the passage of the law and for no other purpose. The meeting on April 30th at the Good Eats Cafeteria was an open one and no watchmen were on guard so far as the witness knew.

J. F. BARNEY was next called as plaintiff's witness. He testified that he was caretaker of the Labor Temple at Seattle during the month of May, 1917. He recognized the "No Conscription" circular, (Plaintiff's Exhibit VI) and recalls that he saw a package of about fitfy of these circulars in one of the rooms in the Labor Temple, viz: Hall No. 107. They were placed on a pedestal in the Hall and he dumped them into the waste paper receptacle. He did not know who carried them to the Temple, but simply found them on the table or pedestal in one of the rooms in the building.

THOMAS B. FOSTER testified that Defendant Wells was arrested May 28, 1917, and that Ft. Lawton is a military reservation in the Northern limits of Seattle.

SARAS PASS, sister of the defendants Morris and Joe Pass, was called as the Government's next witness. She identified a signature on plaintiff's Exhibit VIII, (Application for a Post Office Box)

offered for identification, as that of her brother Morris Pass.

GEORGE C. REID was called as plaintiff's next witness. He testified that he was then employed as a postal clerk in charge of the Post Office Box Department in the Seattle Post Office. He identified Plaintiff's Exhibit VIII as an application for a Post Office Box, in the City of Seattle made under the date of May 4, 1917.

FRANK B. GREENE was called as plaintiff's next witness. Witness testified that he was employed as an agent of the United States Secret Service and was assigned to duty and acting as such in the Secret Service Office in New York City in the month of October, 1917. Defendants Morris and Joe Pass were questioned by operative Burke in witness' presence concerning their relation to the publication and distribution of the "No Conscription" circulars, while in the witnesses' office in New York City. Witness made certain stenographic notes of the questions propounded to the defendants and their answers thereto. Witness recalled that Joseph Pass told him Morris and Joe had left Seattle on May 28th or 29th to travel East to New York by slow stages, working his way from place to place enroute. This witness stated that Joseph Pass said that he was present at several meetings in Seattle at which the "No Conscription" circular was discussed, mentioning Stevens Hall and the

Good Eats Cafeteria. Morris said he attended two meetings where the no-conscription leaflet was discussed.

Morris Pass told the witness that it was his purpose to circulate them. Morris said something about giving them to his friends. Witness referred to the transcript of the stenographic statement which he took at the time and then recalled that Morris Pass stated that he was at the meeting when they were distributed among those present; that the circulars were divided up among those present for distribution purposes and further that Morris Pass distributed some of them. Witness remembered also that Morris Pass stated that a collection was taken up that evening amounting to $10.00 which he gave to Mr. Wells to pay for the printing. On Cross Examination witness remembered that Morris Pass did not fix the time or place but that Morris said that he attended only two meetings; that the second one was convened for the purpose of protesting against the High Cost of Living and that he attended it for that purpose; that Joe Pass said he was present at one meeting in the Good Eats Cafeteria but could not remember whether Joe said he was at the Epler Block or not. Witness remembered that Jos Pass said he had nothing to do with the preparation of the circular but that it had been prepared before he reached the meeting and entered some objection at the meeting against

the wording of the circular, "but not very strong." On Re-Direct Examination witness Greene said that he (Joe Pass) said he was present at the meeting where the draft of the circular was discussed; that the meeting was a sort of an informal one; that there was a general discussion about it and some objections raised to it by the members present. The defendant, Joe Pass, entered some objection to the wording and tone of the circular. Everyone in fact had raised objection to the general tone of the circular. That Joe Pass was asked if he protested against the circular and its distribution and Joe replied that he did not because he was a stranger in the meeting who had casually dropped in and that he did not enter into the general discussion which was carried on among those present about the circular.

WILLIAM N. FLYNN was next called as plaintiff's witness. He was then holding the rank of Ensign in the Navy but was employed in October, 1917, as an Assistant Operative in the United States Secret Service for the State Department at New York. He was present when Morris Pass was interrogated, in the office of the Secret Service Department at New York City, October 13, 1917. Mr. Greene and Mr. Burke were also present. This witness stated that Morris said he had been in Seattle up to the 28th or 29th of May, 1917, when he left to work his way to New York. Witness remembered

that Morris Pass said that he was present at the meeting at which the circulars were first opened and divided among the various people present, everybody helping themselves; that he had taken ten or twenty and distributed them to his friends. Upon objection being raised by counsel for the defense the Court admitted the further statement of Morris Pass with the understanding that it could only be admitted against him individually as the conspiracy charge had ended. Witness was then permitted to testify under the announcement from the Court that his (Morris Pass') testimony could only affect his own individual case and would not be binding upon the others in the conspiracy. Witness then said that Morris Pass said that at the meeting the circular was read and approved in the main and the money collected from those present to cover the cost of printing it to the extent of about $10.00; that someone asked him to take charge of the money which he did, agreeing to hold it until the circulars were printed. Morris Pass further stated that he was asked to obtain a Post Office Box, that he tried to rent one, but could not get references enough to satisfy the authorities; that Box 225 was used and that it was probably secured through Mr. Fislerman, but the witness did not know, stating that he was acting for the "No Conscription League."

C. J. FRASER was called as the Government's next witness and testified that he found a copy of

the plaintiff's Exhibit VI, the "No Conscription" circular upon the front porch of his home, which was located about a block from the boundary line of the Fort Lawton Military Reservation on Sunday Morning, the 13th of May, 1917. He was asked if he exhibited this circular to anyone else. Thereupon counsel for the defense objected upon the ground that the defendants were not shown to be responsible for the witness' exhibition of the circular. This objection was overruled and thereupon Judge Bell for the defendants was allowed an exception. Witness then stated that he exhibited this "No Conscription" circular to one Mrs. Knight.

MRS. C. J. FRASER, wife of the preceding witness, was next called by the Government. She recognized plaintiff's Exhibit VI, which her husband found on the front porch of their home on Sunday Morning, May 13th. She found three other similar circulars in her mail box. Defendants moved to strike. Motion overruled, same ruling.

DUBOIS MITCHELL, reference librarian of the Seattle Public Library, offered the population statistics for the City of Seattle for the census of 1900 and also that of 1910. The counsel for the defense objected upon the ground that it was immaterial, but his objection was overruled and the census records of Seattle admitted.

ARTHUR ROYCE, court reporter, was next called by the Government and testified that he re-

ported the case of U. S. vs. Morris Pass, cause No. 3752; that he had with him portions of the testimony of Morris Pass given under cross-examination by Mr. Moore, which were as follows:

He was asked at the former trial whether he paid for the printing of the circular. He denied so doing. He admitted that a collection was taken up to pay for the printing of the circular. The money was placed on a table at the meeting; that Mr. Wells took part of the money and he took part of it, which he gave to the defendant, Wells, later. He was asked at the former trial whether he said he would obtain a postoffice box for the organization and stated that he went to the postoffice to make application for a postoffice box at the Seattle Postoffice; that the box was for his own use, as well as for the "No-Conscription League."

Thereupon the plaintiff rested. This was substantially all the evidence offered by the plaintiff in support of his case in chief. The court excused the jury, which retired from the courtroom.

Mr. Bell, attorney for the several defendants at bar, then moved for a direct verdict as to each and all of the defendants, stating that the grounds of his motion applied equally to all of the defendants, stating specifically "that the evidence is insufficient to show the commission of the crime charged in the indictment, or any of them against the United States."

The court in substance stated that actual force was not necessary as an element of the conspiracy charged, and after argument by Mr. Bell, denied the motion for directed verdict as to each and all of the defendants, to which refusal of the court Mr. Bell took an exception, which his Honor allowed, and which was duly noted in the record.

Thereupon the defendant, HULET M. WELLS, was produced and sworn as a witness for himself on behalf of the defendants.

Defendant testified that he was thirty-nine years of age; had worked for a number of years as a postoffice clerk and as a city employee, and was so employed by the city during the time of the alleged conspiracy; had received some legal training and had been duly admitted to practice law in the Supreme Court of Washington. He had long been connected with the Socialist movement and had taken an active part in Socialist politics, commencing as early as 1904. He stated that there was a national organization, known as the American Union against Militarism, which worked with those Socialists who were inclined to work with them, stating that many prominent Socialists thought that the ends of the Socialist party would be furthered by uniting with any body or society which was pursuing the same object. This Union against militarism had a branch in Seattle. Defendant took part in the movement and attended an open meeting

at the Dreamland Pavilion, stating that a number of prominent men, including a public service commissioner, spoke at this meeting and that he also was one of the speakers.

The object and purpose of the society was to present to the people the view that newspapers of the country would not present at that time, viz: the view that the United States was not in imminent danger of invasion; that we had an efficient Navy and there was no imminent need of greatly increasing the expense of the Army and Navy. Defendant was conscientious in this belief; was strongly against old world militarism and did not want to see it implanted in this country.

Said meetings were held in Seattle before the declaration of war and were held quite frequently about a year before the declaration. Meetings were held at Dreamland Pavilion and at the Good Eats Cafeteria, and speaking generally followed.

In addition to the open meetings and public discussions, a great deal of literature on the subject was received from the headquarters of the society, —one of which was at Washington, D. C., and the other at New York. This literature was circulated locally and read at meetings of the organization, as well as in the meetings of the Labor Unions and Councils. The whole purpose of the society and of the defendant was to get before the people the opinions offered by those who were favorably dis-

posed in their point of view to this movement to place it before Congress. This society continued its agitation up to the time it was seen that the country was about to get into the war. From that time until the declaration of war, they confined their efforts to trying to bring about an honorable avoidance of the war. After war was declared by the United States, the society ceased all opposition to the war itself. After the war was declared, the organization kept together because it was thought there would be many occasions which would arise from time to time, which would require the liberty of the people to be safe-guarded. It was thought that conscription would quite likely become one of the issues and that the society and its members should endeavor to prevent the enactment of such a law.

At this point, Mr. Bell for the defendants asked this question:

"Q. What steps were taken by the local branches, by yourself and other members, with reference to opposing the conscription act."

Mr. Reames for the prosecution objected upon the ground that the inquiry was immaterial.

Mr. Bell then referred specifically to the Act of May 18, 1917.

Mr. Reames then objected on the ground that such inquiry was immaterial.

The court sustained the objection.

Mr. Bell then stated to the court as follows:

"It would tend to show the matter of good faith on the part of these defendants,—what they did, what they said in reference to this Conscription Act, what they did and why they took part in the circulation of the circular about so much has been said in the cause in chief."

The court sustained the objection.

Mr. Bell noted an exception.

Defendant then stated that he was opposed to the conscription law before it became a law, stating as follows: I was never so deeply moved over any contemplated legislation as I was over this Conscription Act.

"Everything I could lawfully do I was determined to do to prevent its enactment. I considered that it was opposed to all of our American tradition."

Defendant wrote various men in Congress in February, 1917, and received replies from them, and among them one from Mr. Dill, stating that he, Mr. Dill, was in agreement with his views. Defendants offered to introduce these letters. Mr. Reames for the Government objected to their introduction. The court sustained the objection. Exception noted.

Defendant further stated that he and his associates in the organization referred to, circulated literature, made speeches before different labor bodies and tried to impress upon the people of the United States their purpose to oppose legislation of

that character. This was before the opposed draft act became a law.

On April 30, 1917, a group of interested persons of the same organization, to-wit, The American Union against Militarism, met at the place they were accustomed to meet, to-wit: in the Good Eats Cafeteria in the city of Seattle. It was an open meeting held, however, without notice to the general public. It was so open in fact, that a reporter walked in on them and inquired of the members present the purpose of the meeting. After dinner general discussion followed. About twenty-five persons were present. Defendant Wells was sure that neither of the Pass brothers were present, but he saw them at a later meeting. Most of the discussion at the meeting was as to what the general idea was in regard to what should go into the circular.

The sense of the meeting witness understood it, was that the proposed draft legislation in Congress was unconstitutional; that it was proposed that a circular should be prepared in which defendant proposed that Daniel Webster should be quoted, because in some case in Court, Webster was supposed to have argued against the constitutionality of such a law in 1812; that in addition witness wanted it shown that such legislation was entirely out of harmony with American institutions. That it tended to encourage militarism and would inevitably result in a war in the end. The members

of this meeting on April 30, 1917, were respectable, law-abiding men and women. There was no talk or suggestion of using force or employing force, or advising the employment of force. Such an idea was absurd and no such thought was ever expressed by anyone.

Asked as to what the meeting finally concluded to do about getting out the circular, defendant stated that he left early, as Mr. Duncan, the Government witness, had stated, to attend a meeting of the Electrical Workers Union.

Discussion was still on when the defendant left. He stated that they tried to press him into preparing a circular, when he had expressed his idea of what ought to go into the circular. He said that he had enough to do,—did not have the time and so begged off. As he was going out, he was asked if he would mind attending to the printing of it because of his experience in that line. Wells must have promised that he would attend to the printing of it because he did. No form of circular was adopted before the defendant, Wells, left the meeting. The members present had not come to any conclusion when he left. There was not to be anything drafted that night. It was simply put into somebody's hands to do.

Another meeting was called for the following Friday, which would be May 4, 1917. This meeting was to receive the report of the committee on the

circular and provide means for its being published, and after it had been printed there was to be another meeting to provide for its distribution.

Friday evening, May 4, 1917, the second meeting was held at the Good Eats Cafeteria. The defendant's wife came in after the others had eaten their dinner. Wells' wife was there when he went in. Defendant Wells was just in time to hear some discussion toward the last. The circular had been prepared and read when he arrived. The committee, whoever they were, had prepared it, had passed it over to a table where Morris Pass was sitting. Pass had been prevailed upon to act in a secretarial capacity. At the April 30th meeting the secretary had been chosen but he either declined to act or failed to attend. Morris Pass was selected to act as secretary. Defendant, Morris Pass, according to Wells, was somewhat reluctant to take it, but was coaxed to do so by those present and Pass kindly agreed to do so if there was not too much work connected with it. The proposed manuscript was lying on the table. Wells walked over to the table and got the circular, looked it over and objected to one of the phrases that it contained because it was too strong. Witness called attention to the fact that there might be danger of civil war in the event the conscription law should be enacted; that the language had a very bad sound and that they should strike some of it out and a portion of the circular

was stricken out.

Witness did not prepare the circular, had nothing to do with its preparation. Witness stated from the witness stand that he could give a pretty accurate surmise as to who had written it, but stated that inasmuch as he had been dismissed from the Public Service in the city of Seattle he would not disclose the identity of that person, even if he knew definitely, which he did not. He stated that he would have no objection to disclosing his own part in the preparation if he had taken any, but witness denied taking any part in the preparation of the circular whatsoever.

He said it did not express his entire sentiments, nor was it couched in the language he would have used had he written it.

At this meeting there was no talk about using force, neither was there any expression of that kind. The people present who participated in the meeting were indignant that something was being put over by the great industrial interests of the country; that those present believed, were in favor of compulsory service. They thought that unfair pressure was being brought on congress by the daily papers for the purpose of obtaining a permanent system of military service. They expressed the thought at the meeting that the conscription law was wanted as a permanent institution, rather than a necessary step in the pending war. At this meeting on May

4th a collection was taken up to pay for the circulars that would be printed. Defendants Joe and Morris Pass were there for the first time. Joe Pass took no part in the meeting at all. Morris Pass acted as temporary secretary. Witness was not clear whether he took the circular from those present at the meeting or whether he had received it, as he stated at his former trial, from Morris Pass at the Labor Temple. The manuscript was typewritten. Morris Pass gave him some money at the Labor Temple, which was the same money that was collected on the night of May 4th.

Defendant took the circular to the Trade Printery. Witness suggested to Mr. Listman, who testified for the plaintiff, that it would be well to leave the union label off the circular as it might injure Mr. Listman's business.

Witness stated that the meeting in the Epler Block, May 11th, was an open one. It was suggested that someone present in the meeting might not be in symapthy with those present and it might lead to the meeting being broken up. Defendant laughed at the idea and tried to discourage it, but their ideas prevailed. The feeling of suspicion on the part of the members present dated back to the time when the Socialist headquarters were destroyed and their property burned and broken up. This meeting on May 4th was the only meeting which defendant observed defendant, Joe Pass.

Printer's proof of the circular (Exhibit 4) was sent to defendant Wells' office in the County-City Building, where he was employed in the Lighting Department. He corrected the proof and took it to the office of the Trade Printery, where he turned it over to one of the employees. He made the printer's proof corrections referred to by the Government witnesses, and wrote on the back thereof when he wanted delivery made. He stated that the Government's testimony was correct with reference to the correcting of proof and paying for and procuring the printing to be done at the Trade Printery.

Wells received said printed circulars, took them to the Epler Block for the Friday night meeting on May 11th. The meeting place in the Epler Block was the regular headquarters of the Socialist party. Witness understood that arrangements had been made whereby he and his associates were to have the hall that night for the purpose of their third meeting. Witness wanted the meeting held in conjunction with the Socialist party so that the same would have a good attendance and was prepared to make a little talk as to what he and his associates in the No-Conscription League were trying to do. Wells brought the circulars with him, arriving somewhat late, and found that the arrangements had not been properly made for having the hall to themselves. There were people there for three different purposes. A committee meeting for the

high cost of living met there, composed of Mr. Welty and Mr. Friedmood. There were several others present who were interested in that movement but not on the committee; and there was a committee representing the Young Peoples' Socialist League; and there were still others who came to attend the No-Conscription League meeting.

Witness stated that he explained that there was a conflict of dates and asked whether or not the No-Conscription League could have the right of way. This was agreed to by those present and the meeting progressed. He then stated that it devolved upon him to do the explaining and he explained in general what the purposes of the No-Conscription League were. Witness then left the meeting, went out and brought in his pamphlets for distribution. They were opened up and everybody who would take some were given them for distribution in their home precinct. This was, as the witness explained, the time honored way in which the Socialists distributed their literature. The party for a number of years had tried to maintain the same kind of an organization as the Republicans and Democrats, viz: a precinct committeeman in each precinct, who attended to the work and distribution, leaving Socialist literature on the door steps of the homes in the city on Sunday morning. This was the method that was adopted for distribution.

Witness stated that most of those present took circulars for distribution. Asked as to whether he took any personal part in this distribution, Mr. Wells stated that he distributed quite a number himself. Sadler had nothing to do with the distribution that the witness knew of.

Defendant Sadler was present when the witness made a talk. Sadler didn't understand at the time witness got up and made his talk anything about what they were trying to do as witness thought, but if Sadler said anything at all witness thought he agreed with the general purport of witness' talk.

Q. What did the Pass brothers have to do with it?

A. They didn't have anything to do with it other than Joe Pass happened to be at this meeting at the Good Eats Cafeteria and took no part whatever. There was never a worse perversion of justice or authority than the bringing of him back here to answer in this case just because I mentioned that he happened to be present at a meeting just the same as James Duncan or Miss Strong or my wife.

Witness stated that at the former trial he testified that he met Morris Pass in the lobby of the Labor Temple and took the manuscript which later was printed as the circular referred to as Exhibit 6 from his pocket and gave it to him. Witness, however, recalled more clearly during the present

trial that he got the manuscript from Morris Pass at the Good Eats Cafeteria and got the money at the Labor Temple. He stated in response to Mr. Reames' inquiry that he must have had the typewritten manuscript in his possession in his pocket for several days. Asked particularly, said he had it in his possession at least three days. He did not recall that he read it carefully during this time or that he looked at it from the time he received it from Morris Pass until he gave it to the printer. He admitted that if he read it at all it was only "superficially".

He delivered the same to the Trade Printery some time prior to May 11th and some time after May 4th. "Witness admitted that there had been a discussion between him and Listman about leaving off the shop number from the union label on the circular. Witness suggested that if it was likely to hurt Listman's business any, it would be a good thing to leave it off. Witness knew a paper like the Post-Intelligencer would be likely to knock. He denied that he left it off for any reason connected with the District Attorney." He directed the printer to print twenty thousand copies at the agreed price of twenty dollars. He paid ten dollars at the time and ten dollars later when he received the bundle of printed circulars, making both payments to the printery in person. He asked them to send the proof to him. He received the proof probably Thurs-

day, before the meeting on Friday night, May 11th. He corrected the proof immediately after work at five o'clock on the day received and took it down to the Trade Printery. He made some corrections in the manuscript. Put in the letter "R" before the word "Republic," correcting the word "resist," it being spelled "rezest." He wrote in the figures "225," referring to the postoffice box number; signed the same as stated by the Government witnesses, writing the phrase, "O. K. with corrections."

Witness stated that he personally took the corrected proof manuscript from his office down to the printing office. Witness was interrogated about reading the manuscript for purposes of proof. He was asked whether he did not read every word of the circular by Mr. Reames. He replied that he read every word of it, but simply as a proof reader, paying particular attention to the spelling, punctuation, and proof, without attempting to gather the sense, stating that he had no idea and didn't appreciate at the time he placed it in the printer's hands that there was any objectionable language contained in the circular, admitting, however, full responsibility for placing the same in the printer's hands. Witness was asked for the names of the people whom he had referred as too cowardly to take responsibility for the circular, and in reply said that if he knew he wouldn't tell and this because he himself had suffered persecution. As to distribution,

he stated that he was not solely responsible for it, but distributed about fifty or possibly one hundred out in the district where he lived, going from house to house early Sunday morning. Distribution by him was made in broad daylight at houses where many of the people were up, because he observed smoke coming from the chimneys. It took him about three-quarters of an hour to distribute the bundle of circulares which he took for that purpose. He probably took a precinct map and followed the lines of a precinct. Witness knew nothing about the circulars which were distributed in the Fort Lawton district. He did not know the precinct committeeman for that district. Asked if he could find out who he was, stated that the precinct organizations went to pieces some time ago and the precinct organization was disrupted. Witness said in this connection, "We only had some of the most faithful workers with us on that work."

Witness stated that he did not know more than four or five of the forty or fifty persons who attended the meeting May 11th. Witness testified that he did not see Morris Pass at the meeting held for the purpose of distributing the circulars. Attention of witness Wells was then called to his testimony at the former trial wherein he stated that Morris Pass did not come to the distribution meeting on Friday night until quite late. In reply he stated that probably his recollection at the former

trial was clearer and he would say that Pass did come late. Witness was a little wrought up when he found three meetings there. As long as Morris Pass had accepted the secretaryship, witness thought he would arrange for the hall.

Witness testified that the meeting of May 4th was the first one at which he saw Morris and Joe Pass. Asked if he did not testify at the former trial that they attended the meeting of April 30th, replied that he thought they did, but having talked it over with his wife, whose memory was very good, he was at this trial absolutely sure that they were not there. Witness admitted that he had said nothing at the former trial about the meeting of May 4th. He said: "We were never asked anything about the other (meaning the meeting of May 4th). There was talk about a meeting, and those meetings being a few days apart, and my wife and I being at both meetings, I made a mistake about the Pass boys. They were not at the first meeting, as I know now. My wife cleared that up afterwards." Witness stated that he was familiar in a general way with the National Defense Act, although he had not made a careful examination of it. He had read the Proclamation of Congress on April 6th, declaring war, in the Current News. He knew that Morris Pass was going to rent a postoffice box, as it was discussed at the May 4th meeting, stating that some of the members present thought it necessary

to give some address in order to fix responsibility, otherwise people wouldn't pay attention to the circular, thinking that it was of pro-German origin and that it would not show that it was against militarism, which was the object of the meeting. During the meeting it was suggested that a postoffice box be used and that of the Socialist World could be obtained. He did not know the number at the time, but learned from Morris Pass that the number was 225. Pass called him up on the day that witness read the proof, and said that he had not been able to rent a box and it was then that the box number 225 was selected, which was the one used by the Socialist World.

His attention being called to his testimony at the former trial he said that Morris Pass telephoned him that the postoffice authorities were holding him up because he could not give a reference, and thought that his testimony at the time was true, but the fact was Morris gave him the number and he put it on the proof sheet. On re-direct examination by Mr. Bell, Wells stated that other ways and means of getting anti-conscription sentiment aroused were discussed, viz., mass meetings and parades, etc. It was the sense of the meeting that while these methods might be adopted later, to scatter the anti-conscription idea, it would be better to distribute the circular in the manner in which it was afterwards done. Mr. Wells was then recalled and of-

fered as a witness in chief and interrogated by his counsel concerning the resolution at the Labor Temple on May 23, which he offered before that body. In reply he stated that before May 23rd a resolution had been offered on the subject of coolie labor. It was intended to take up the discussion a week earlier, but for some reason it was postponed for one week. On May 23rd the resolution, identified as Government's Exhibit "7," was offered by Wells and, as he stated, showed the difference between his attitude then as against his attitude before the Conscription Law was passed, because, in the resolution Congress was asked to modify one particular part of that law, viz., that the Congress recognized the rights of the conscientious objector. Wells stated that the resolution was intended to bring about a modification of the law so that there would be no discrimination; that he accepted the law as inevitable and simply asked for a modification in one particular. He prepared and presented it himself at the regular meeting of the Seattle Labor Council on this date, viz., May 23rd. That 75 to 100 delegates were present at the meeting of the Seattle Labor Council. There was no suggestion at that meeting about the use of force in objecting to any law of the United States. The resolution was carried by a large majority, only two members dissenting. The witness wrote the resolution offered on May 23rd himself in his own hand-

writing. Witness testified that the correction in pencil on Government's Exhibit VII was made by him in his hand writing. Witness was asked what he meant by the following words in said resolution: "Those whose ties of blood and birth would compel them to either resist conscription or to crush with fratricidal brutality the best impulses of the human heart," and if the witness did not mean the Germans and Austrians. The witness answered that he meant those who probably had relatives fighting on the other side, and upon the question being twice repeated, the witness said that he meant a certain part of the Germans and Austrians who were conscientious objectors. Witness did not at any time advise or encourage anyone to refuse to register under the Draft Act after it became a law. Knowing that one of his brothers had conscientious objections to the draft he advised him to claim his exemption.

ANNA LOUISE STRONG was next called by the defense and testified that she had resided in the City of Seattle for ten years and had known Mr. Wells and Sadler for a long time, and had no acquaintance with the Pass brothers. She was connected with the American Union Against Militarism, attended a number of its meetings held by the Seattle branch before war was declared. She was asked as to the purpose of the local branch and the general organization. At this point Mr.

Reames objected on the ground that the question was immaterial. Mr. Bell then stated that it was preliminary for the purpose of leading up to other questions. The court sustained the objection and exeception was noted by Mr. Bell. Up to the day war was declared members of the association, including the witness and Mr. Wells, were quite active in getting a straw referendum and wiring the results to Congress daily. After the declaration of war the organization or group practically went to pieces. One or two meetings were held to discuss whether any further activities should be undertaken. Conscription was the first subject discussed. Members of the organization knew that it would be one of the firt things to come up. Witness was present at the meeting of April 30th in the Good Eats Cafeteria, three or four weeks before the Draft Law passed. The bill was then pending in Congress. This was an open meeting, at which thirty or forty attended. There was a general discussion of several things, but the sense of the meeting was that something should be done to prevent the passage of the Conscription Law. Some communications from the East were discussed. The feasibility of holding parades and mass meetings was also discussed. The idea of holding parades was discouraged and dropped because, in view of the public feeting, it was thought it would provoke a disturbance. The main discussion centered on

literature which it was thought could be obtained from the East. It was then observed that this literature could not be obtained in time. Matters were pressing on and steps should be taken before the law passed. The meeting finally concluded in favor of getting out some literature. Witness remembered that Mrs. Wells was present with Mr. Duncan. She was asked to serve on the committee, but didn't have time. Mr. Wells also refused for the same reason. He was then asked, because of his familiarity with printed matters, whether he could handle that end of it. Wells replied that he would be glad to look after that phase of it. Wells said this just as he was putting on his coat to leave and left before the meeting was concluded. No circular had been prepared up to this time. The contents of the circular were discussed, "only in a very sketchy way." "One of the suggestions was that the circular ought to be very short and to the point." The exact details of the circular were left and not settled at this meeting, nor was the particular language of the circular adopted. The general purpose of it, however, was to oppose the passage of the Conscription Law, which was then pending in Congress. A good deal of discussion was had between the members to the effect that they had all written and telegraphed to Congress so much that it would be better to get some additional people stirred up to do the same thing and the circular idea

was finally adopted at this meeting. The circular was adopted as a means of arousing public sentiment generally. There was no suggestion about using force or engaging in forcible opposition to the Selective Draft, the only suggestion of force at all, which came up in the discussion was to the effect that a possible disturbance might result in arousing public opinion and that some means should be adopted to get the information before the public, which would not be of a sort to stir up trouble. It was the sense of the meeting that parades and mass meetings might do this. The entire members present were against the adoption of the then proposed Draft Act or Conscription Bill. Witness did not remember whether defendant Sadler was present or not, but would judge that he was not present, nor were Morris and Joe Pass. The matter of distribution was discussed to much greater extent than the actual contents of the circular, because it was known that the distribution would have to be made very soon if it was going to be effective, and it was suggested that if made Sunday morning it would reach a large number of people who were then in their homes, and the house to house circulation was deemed the best method of distribution. Witenss was asked this question:

Q. What were you trying to accomplish—what was the meeting trying to accomplish by scattering these circulars broadcast over the city?

A. To make people feel if they didn't want Conscription that it was time for them to act—better do something about it, pass resolutions and take interest in their laws.

The meeting was composed of Socialists and other representatives from the Labor Temple. Witness remembered that a very large proportion of the meeting was composed of representatives of organized labor and of the Socialist party. There was a great deal of discussion, among other things, as to how far in the war the Nation should go. Various communications from various Congressmen were referred to. Witness could only remember Wells and Duncan among the thirty or forty people who were present. On cross-examination by Mr. Reames she would not state positively whether Morris and Joe Pass were there, but her impression was they were not. A collection was taken at this meeting. Money was laid on the table for that purpose. This collection was for the purpose of defraying the expense of the circular.

Witness never saw the circular before it was distributed, had nothing to do with the distribution itself and saw it for the first time when it was published in the newspapers. On re-direct examination witness stated that the personnel of these meetings varied a great deal from time to time. Meetings of the League extended back to the time the country seemed to be in danger of getting into

war with Mexico.

MORRIS PASS was next called as a witness on behalf of the defendant. He stated that he was not present at the meeting of April 30th, but was present at the meeting of the Goods Eats Cafeteria on May 4th. This was an open meeting at which about thirty people were present. Defendant Wells and witness' brother, Joe Pass, were at that meeting. Joe Pass took no part in the meeting at all or in the subject under discussion. Witness stated that the meeting was in progress when he arrived; that part of the circular had been read and he only heard a portion of it, perhaps a third or a half. After this general discussion followed and more or less criticism indulged in. Some parts of it were eliminated. Witness could not recall, however, just which parts they were. Wells joined in the discussion, according to this witness, making the statement that it was objectionable and had a tinge or tone of yellow journalism to it. Wells' criticism was of the form of the article and not of the purpose of it. The purpose of the meeting, as the witness understood it, was to create sentiment among the people of Seattle to appeal to Congress to consider the law very carefully. The Selective Draft Act was then pending in Congress, but had not then passed. There was much discussion as to the unconstitutionality of such a law and that it was opposed to the history and traditions of this Government. Asked as to

what arrangements had been made for printing it, witness stated that these arrangements had evidently been completed, for he didn't find out who took care of the printing until later. During the meeting someone was asked to act as secretary. Defendant Wells was asked. They all stated they had no time to attend to it, and witness was asked to take care of the secretaryship. He offered the same objection and the members present then suggested that all they wanted was to have someone arrange for a postoffice box. Witness agreed to undertake to do that. Witness went to the Postoffice Department, procured a blank requiring him to give two people for references and entered his application for the box. Returning later he found that one of his references had not responded and as the box was wanted for immediate use he called up Mr. Wells and told him he could not obtain the postoffice box. At the meeting the matter of using the Social box, No. 225, was discussed. Everybody agreed to this, except one or two, who thought it best to have a box for that special purpose. Finding that he could not obtain the box in time, he called Mr. Wells. The discussion at the meeting was to taek some steps as to prevent the passage of the law before Congress should enact it into a law to urge as many people as possible to co-operate with the organization to bring forth its aims. Mass meetings and parades were discussed. A collection was taken

up, the money placed on the center of the table. This was at the meeting in the Good Eats Cafeteria. After the circular had been read general discussion followed. Witness had nothing to do with the circulation or distribution of the pamphlet. On cross-examination witness stated that he was not at the meeting where the distribution was discussed. He did not know who wrote the circular, nor anyone who does know; saw the printed circular for the first time on the porch in front of his house. Witness attended a meeting in the Socialist headquarters, at which the possibility of discussing the high cost of living was engaged in. This meeting was after the meeting of May 4th, to-wit, on May 10th or 11th, at which the money was collected. At the meeting of May 4th witness did not observe any printed circular was there, but witness did not hear the entire contents read, as some portions of it had been cut out, and could not state what portion of the circular Mr. Wells objected to, although witness was present when Wells objected to certain portions. Witness never talked with Mr. Wells as to who wrote the circular. The members of the meeting knew that the witness was not a citizen of the United States, but that made no difference and his citizenship was not discussed. It was understood that he was not a formal secretary, but was merely acting to look after the matter of the postoffice box. Witness was born in Russia and came to the United

States when nine years of age and was then twenty-three years of age. Asked specifically whether he attended the meeting of April 30th, replied that he did not, stating that the first one he did attend was the meeting of May 4th. Witness stated that he went to the postoffice to rent the box about noon. The meeting was held on May 4th after dinner in the evening, between six and seven o'clock. Mr. Reames called his attention to the application for postoffice box, which he had stated that he signed at the noon hour, and was asked if made out in the noon hour of May 4th how it was possible that the matter of the postoffice box was not arranged for until six o'clock that night. Witness could not account for this, but stated positively that he was present at the meeting on May 4th. This was the only meeting he attended in which the postoffice box discussion arose.

Q. (By Mr. Reames.) Assuming that the post-office records are correct and that you made the application on May 4th and your testimony is true that you went down there at noon, it is inexplainable.

A. It is undoubtedly a mistake.

Witness stated that his brother, Jos Pass, was with him at the meeting and the only other person whom he knew at the meeting was Mr. Wells. The meeting of May 4th was the only one that witness attended. There were about thirty people present,

some of whom were women. Witness did not know who was chairman of the meeting. Witness took charge of $9.00 or $10.00 at this meeting. Finding Wells was not present, someone suggested that the money should be given to him. Witness then stated that he would be at the Labor Temple and would attend to that. Witness was not a member of the "No Conscription League" and took no part in the discussion as to what should go into the circular and assumed no responsibility for it at all. Witness was then asked if he was not asked the question in New York City in the office of the secret service whether he was present when the circulars were divided up for distribution. Witness stated that he did not make such a statement. He was asked if Wells did not leave the meeting, if he did not say that Wells was there in the earlier part of the distribution, and whether he did not take some circulars for distribution. Witness recalled that such questions were asked, but that his answers were not as indicated by Mr. Reames. Witness was asked whether he did not say in New York City at the secret service office that he had a dozen or two of these circulars and handed them around among his friends. Witness replied that he did not so state. Mr. Reames then propounded a number of questions to the witness, asking if these questions were not asked of him in the secret service office in New York and if he did not make certain replies to them,

the substance of which was that the circular was read, money was collected, that the witness took care of the money and that the funds were to be turned over to him because he was about to leave Seattle. Witness' attention was then called to this occasion, which was fully identified, when he was questioned by United States secret service men in New York City. Witness denied that on said occasion he had admitted that he was present at the meeting when the circulars were divided up for distribution; denied that he had said Wells was there in the earlier part of the distribution, and denied that he said that he had circulated some of them, the exact number whereof he did not recollect; that he had not left any in doorways or halls or like that, but had just handed them to his friends; that he had had about a dozen or two dozen of those circulars. Witness admitted that on said occasion in New York he had told the secret service men in language which in substance carried the thought that he had first acted as secretary at the meeting when the circular was read, and it was arranged some way or other that he should take care of the money. About ten dollars was donated then and there by people in the meeting; that he had more time than any one else and some one had suggested that he take the money. Witness admitted his participation in the meeting of May 4th, but denied that he stated in New York that the money was

given him because he was about to leave Seattle. He denied stating in New York that he was present at a meeting when the distribution took place. He left Seattle on May 28th on the day his brother Joe was married in Tacoma. Witness left, together with Joe. Witness did not know that Wells had been arrested the day he left for the East. Asked by Mr. Reames as to what name he used after leaving Seattle, Morris Pass replied that he used his middle name, which in Hebrew, is Lev. In making the trip across the country he used the name Levine, to-wit, Morris Levine. His full name is Morris Lev Pass. He reached New York the 10th or 12th of September. He registered in Sandpoint, Idaho, under the Selective Draft Act on June 5, 1917, as Morris Levine. Being migratory, as he termed it, and intending to work from city to city enroute to New York, he gave his address as Butte or some other point in Montana. Cross-examined further by Mr. Reames as to a meeting held at the Socialist headquarters in the Epler Block two or three days before the Sunday when the circulars were distributed, witness admitted attending such a meeting, and that the meeting was held on about May 10th or 11th. He was asked whether it was the identical meeting the other witnesses testified about and he said they evidently referred to another meeting. Mr. Sam Sadler was present at this meeting in the Epler Block, as witness understood, some

other men from the Central Labor Council. He recalled that this meeting, among other things, was called to discuss the high cost of living, and that some pamphlets or circulars were on the table, but didn't know what they were and didn't know anything about their distribution—the circulars were not discussed at the meeting which he attended. He could not state whether Mr. Friermood or Mr. Welty were present at this particular meeting or not. Dave Lavine, the Government witness, attended this meeting, according to the witness' recollection. Asked as to the meeting referred to he stated that it was held in the Epler Block at the Socialist party headquarters on the third floor of that building.

He observed that the circulars were scattered about upon the table. He didn't know what the circular was about for he didn't read it, but understood that the circular was the same that the Government introduced as Plaintiff's Ex. 6. On Re-Direct Examination the witness stated that he arrived late and nothing was said about distribution after his arrival. This meeting was called, among other things, to protest against the high cost of living and the circular was not discussed. The only meeting the witness attended where the circular came up for discussion was the one held at the Good Eats Cafeteria. He had nothing to do with the preparation of the circular, its contents, its printing

or its distribution. Asked by counsel for the defense on Re-Direct Examination he stated that he was without counsel at the meeting in the office of the secret service at New York City and that the examining officer would say, "Omit that one," and "Take down this one," referring to the questions and answers and that the statement to which his attention was called by Mr. Reames did not accurately record what he said. Witness stated that he registered in Sandpoint under the Draft Act and kept in touch with his Local Board; that he filled out his Questionnaire and filed it, giving his name then as Morris Pass.

ON RE-DIRECT EXAMINATION by Mr. Bell, Morris Pass stated that none was present during the interview in the office of the secret service agents in New York City except the three secret service agents. He further stated that they were badgering him with questions. He was asked this question: "They were threatening you? A. Yes, sir.

Q. What did they say about putting handcuffs on you if you would not come peaceably?

A. When the detectives came to me first I asked if there was any warrant out against me. I said is there any reason why I should come? They said that they wanted to interview me. They showed me some handcuffs and they said which did I prefer to do, come peaceable or that the officers should

force me.

Q. Did you try to get counsel?

A. I did.

Q| Were you permitted to do so?

A. No, sir."

He further stated in response to questions by Mr. Bell, if he was ever asked to sign the so-called card. He replied "no, sir."

On RE-CROSS EXAMINATION Mr. Reames developed the fact that he had been arrested and was out on bail when he filled out his Questionnaire. Referring to the dates upon which the collection was made he said that the money for the circulars collected at the meeting on May 4, he delivered to Wells for the printing of the circulars after that. He attended a meeting subsequently when the circulars were present on the table. Witness did not recall that he saw Wells on the night he saw circulars on the table in his answer to Mr. Reames on Re-Cross Examination.

JOE PASS was next called for and on behalf of the defendants stated that he was one of the defendants; that his name was Joe Pass, that he was a brother of Morris and acquainted with defendants Sadler and Wells. He married on May 31, 1917, and left Seatte the day of his marriage. He recalled that he was present at a meeting in the Good Eats Cafeteria where there was some discussion of the proposed Conscription Act. He re-

called that the date was May 4th. His brother and Mrs. Wells were also present. He thought Sadler was there but at the time of trial was not sure. He had seen Sadler at a number of these Socialist meetings. Wells and his wife were there but he was not certain about Sadler. Asked as to what prompted him to attend the meeting he replied that on May 1st, International Labor Day, at a meeting in Stevens Hall, it was announced from the platform that a very important meeting was to be held at the Good Eats Cafeteria a few days later. The purpose of the meeting was not stated. He understood that the American Union against Militarism would hold the meeting, viz: that it would be held under the auspices of the American Union against Militarism or League against Militarism. Arriving at the meeting witness stated that he did not take any part in it at all. He ate various things during the dinner, remembered that a typewritten draft of a Conscription Circular was read. He did not remember who read it. He had come in late and was still eating when the discussion was taken up. He was engaged in conversation most of the time by the woman sitting at his right. He understood the purpose of the meeting to be to adopt a plan to agitate against the passage of the pending Conscription Act. According to the witness there was no suggestion at any time whie he was present that force be adopted to oppose the passage of this law,

or in fact any other law of the United States.

Witness testified as follows:

"Q. When you were asked your opinion of the circular what did you say?

A. I said I didn't like the language of the circular."

According to this witness, the particular language of the circular was not voted upon, nor adopted by the meeting and witness took no part in any voting by the members, if such took place, which, in fact, he did not recall.

DEFENDANT JOE PASS took no part in the collection, contributed nothing toward it, and did nothing in connection with the preparation of the circular. It was the first meeting the witness attended and the circular had already been reported upon. Witness attended no other meeting.

He first observed the circular in its printed form when it was found upon the front porch of his house. He also saw it in one or two other places in the city and read about it in the newspapers. He left the city two or three weeks after the circular had been published. Mr. Wells had been arrested just before he left the city. He first learned that the Government connected him with the matter after he had been in New York about ten days or two weeks.

He left Seattle on May 31st for New York, working at odd jobs from place to place en route.

He registered in Sandpoint, Idaho, under the name of Joe Levine.

In December after his arrest he filled out his questionnaire, notifying them at the time of his address, all under the name of Joe Pass. According to this witness, he thought that Sadler was present at the meeting in the Good Eats Cafeteria, but could not swear to it.

ON CROSS-EXAMINATION, he told Mr. Reames that he had not left secretly, but that he told of his purpose to go to New York to his brother Dave.

Witness' address in New York City was general delivery. He was arrested three or four weeks after his arrival.

Witness further on cross-examination stated that he attended a meeting of the American Union Against Militarism at the Good Eats Cafeteria quite awhile before the meeting on Friday night, May 4th. This meeting on May 4th was the only one which the witness attended. He was not present at the meeting in the Epler Block, when the matter of distribution was considered. According to his recollection, there were thirty-five or forty people present at the May 4th meeting. Someone read the typewritten draft of the circular at the meeting. He did not know who read it, nor who was the author of it, nor who stood sponsor for it. According to him, it seemed that a committee had been appointed at a

previous meeting for this purpose and that this committee on the night of the May 4th meeting was asked to report, which they did, with the leaflet in question.

He heard the entire draft of the circular read as he recalled. He was, however, engaged in talking to a woman sitting at the table beside him and did not pay very close attention to the reading.

Asked if he knew that it was the purpose of the meeting to plan on the distribution of the circular, he replied there was nothing spoken about it, although he presumed they were prepared to circulate, or rather, distribute, the circulars.

Witness is not a citizen of the United States, although he had resided within the United States for some fourteen years. He was asked by someone what he thought of the circular. He told the person that he thought the language very rash and it did not appeal to him as a literary critic.

Asked as to his ability to indulge in literary criticism, he stated that he had attended the public schools in Cleveland, Ohio; taken a preparatory course under the Y. M. C. A. auspices, which was equivalent to a high school course; had attended some special course in Columbia University.

Witness criticized the language and the expressions used.

Asked as to why he did not press his objections more forcibly, witness replied that he was not a

member of the organization and did not feel that he should take it upon himself to "butt in"—as he expressed it. He left about nine o'clock in the evening to meet the young lady with whom he was keeping company and whom he married on May 31st.

When he left the matter of distribution or printing had not been arranged for. He heard only the discussion concerning the circular. He did not recall whether the money was collected for printing and distribution at this time or not. He did not contribute, even if the subject was under discussion, which he could not recall.

Asked as to whether his brother, Morris, assisted in taking up a collection, witness could not say.

He raised no protest against the distribution of the circular, for the matter of distribution was not discussed while he was there.

Asked as to why he did not protest against the proceedings, he replied that he was not a member and did not feel that he should take part in the deliberations of the members present.

Defendant, SAM SADLER, was next called as a witness on behalf of defendant. He replied that he had known Mr. Wells about nine years and had known the Pass brothers for one and a half years. He had resided in Seattle during his acquaintance with Mr. Wells. He was a machinist by trade and had been connected with the Labor Union and So-

cialist party movement for a long time. He was never a member of the American League Against Militarism; was never in sympathy with it and never affiliated with a pacifist movement at all. He had no connection with the No-Conscription League; and the only two organizations which he was ever connected with were the Socialist party and the American Federation of Labor. He stated that he was not present at the meeting at the Good Eats Cafeteria when the circular (Plaintiff's Exhibit 6) was brought out for discussion. He admitted that he was present at the meeting in the Epler Block on May 11th. There were two or three meetings in progress on this occasion. As a delegate of the Longshoremen's Union he went up to the Labor Temple on Wednesday night when a communication was read by the secretary of the Socialist party, asking that delegates be sent to attend the meeting in the Epler Block on Friday night to arrange for a protest meeting or a parade to deal with the high cost of living.

Two or three others were selected with this witness, among whom were Friermord and Welty.

Arriving at the hall, he found the meeting in progress. He had nothing to do with the pamphlet or circular referred to as Plaintiff's Exhibit 6. Did not take charge of them. Had nothing to do with the collection of money for the purpose of printing them. Did not handle the money and had nothing to

do with the matter at all. He did not contribute any money for this purpose. His attention was first called to the circulars by the articles appearing in the newspapers and them saw the circular in question. The circular had at that time been distributed, for a printed extract from it was published in the P.-I. He also saw a copy of it in the Labor Temple on Wednesday following its distribution on Sunday. It was handed to him and he was asked if he had read it. He heard they had been distributed broadcast through the city, but did not get any of them.

At the meeting in the Epler Block there was a general discussion about holding a parade and getting out printed matter to advertise a big meeting somewhere. Several organizations had sent delegates. There was no talk about opposition to the Government or any law of the Government.

Witness had nothing to do with the No-Conscription League or its propaganda.

On CROSS-EXAMINATION by Mr. Reames, he replied that he had been married to his present wife ten years; that she was a Socialist worker, frequently speaking for the Socialist party and organized labor. He didn't know whether she ever spoke against militarism. He never attended any of her meetings, except some Socialist meetings. He never attended her in going from place to place, except he was with her on one trip to Los Angeles.

He attended a meeting in the Epler Block on the Friday preceding the distribution of the No-Conscription circular on Sunday morning. Messrs. Wells, Friermord, Welty, Rankin and David Levine were there. He could not recall the names of any other persons present. There were committees from several organizations present. There was no sergeant-at-arms at the door. The meeting was not polled and no one was vouched for. It was an open meeting at which anyone could attend. There was no suggestion made that there was any danger of the meeting being broken up by either the authorities or anybody else. Witness arrived about eight-thirty o'clock. Stayed about an hour. It was held in the headquarters of the Socialist party in the Epler Block.

Witness was asked if he was present at the time the resolution was adopted on May 23rd at the Labor Temple, replied he must have been there, but could not recall clearly about the meeting. It was a public meeting and he could not tell whether a roll call was had or not. He just happened to be in there. His attention was called to an alleged statement that Wells had made to the effect that Sadler had made a talk relative to the distribution of the circulars. He replied that he did not remember Wells' testimony, but that if Wells did make that testimony it was not true. There was nothing said at the Labor Temple meeting of May 23rd to

oppose the law. He had advised young men to register under the Draft Act. These two young men were Clarence L. Parks and George Zimmerman. He advised both of these persons about complying with the Draft Act before it had even passed.

Next witness in behalf of the defendant is CLARENCE L. PARKS, who stated that he had known Sam Sadler for eight years and that Sadler advised him to register. This was before the act became a law.

On CROSS-EXAMINATION, witness remembered that he made inquiry of Sadler about the proposed law.

Witness claimed exemption under his questionnaire upon the ground that he had a dependent family.

Conversation with Sam Sadler occurred before the law passed. There were other people standing around who heard the advice.

DAVID LEVINE was next called on behalf of the defendant. Testified that he had known Morris and Joe Pass all his life. He was born in the same city where they were. He knew about their intention to leave some eight months before they left Seattle. Was always talking about going to New York. Joe intended to study literature there. He knew they were about to leave somewhere about the first of June, but did not know the exact date.

Mr. Reames called his attention to a letter which he wrote under date of November 1, 1917, to Morris

and Joe Pass at New York City. He admitted signing and sending the letter to them, which letter showed him to be upon terms of familiarity with them and interested in arranging bail for them and looking after their welfare.

HELEN BARR PASS was next offered on behalf of the defendants. She testified that she was the wife of Joe Pass, having married him on May 31, 1917. Her husband leaving the same day for New York City. There was parental objection on both sides to witness' marriage to Joe Pass and it was kept secret. She knew that Joe had been planning to leave for New York for a long time, for a year at least. There was no secrecy about his purpose of leaving Seattle.

LEWIS BERG was next called as witness for defendants. Testified that he was a manufacturing jeweler in the City of Seattle and knew Morris and Joe Pass. Had been acquainted with them since early in the spring of 1917. He knew of the intention of these defendants to leave Seattle for New York some seven or eight months before they left. They made no secret about their purpose to leave Seattle. Morris intended to study art and Joe intended to go there for some literary work. Morris told him that in traveling he was frequently in the habit of using the name of Levine. Witness did not know of Joe's intention to use the name Levine. This witness did not write the Pass boys at their

general delivery address in New York. He learned their address through David Levine.

NESTA WELLS was next called for the defendants. She testified that she was the wife of defendant, Hulet M. Wells. Had been married nearly ten years. She attended two meetings of the No-Conscription League. The first about April 30th and the second on May 4th. On April 30th there were about twenty-eight or thirty people present. The sexes were about evenly divided. She went to the first meeting so that she could meet her husband, whom she knew would be there. Nothing was said about the use of force to oppose the laws or authority of the United States. She said these people were not an impulsive kind of people, but were calm, thoughtful and intelligent, and seemed to have a conscientious desire and longing for peace.

The proposed Draft Law was being discussed and the meeting was for the purpose of showing the people in Washington that they were fighting against it. There was no suggestion made by Wells to use force in the opposition of the enactment. Asked if defendant Sadler was there, witness did not think so. The first time she saw Joe and Morris Pass was at the next meeting. Witness remembered that Mr. Duncan was there, because he went out with her husband, and she thought Miss Strong was there also.

She said that she did not remember whether

any vote on the subject of this literature was taken or not, but that she did not vote if in fact a vote took place.

It was decided to circularize the city and the committee was selected to draft a pamphlet that would be sent out and distributed at the homes. The matter of holding meetings and parades was discussed. They decided they would not reach as many people, not so easy to handle, and would take more money.

The next meeting was on May 4th at the Good Eats Cafeteria. This was also an open meeting. Witness went there to meet her husband, Mr. Wells. She arrived at the close of the meeting, just in time to meet her husband, and she was not familiar with what occurred. She remembered that the two Pass boys were there, as was also Miss Strong. Nothing was said at this meeting by Mr. Wells about forcibly opposing the laws of the United States. She had never heard her husband counsel using force or anything of that kind against the authority of the United States. He believed, on the other hand, that the laws should be written after political thought and action, and Congresss hould be appealed to, in the matter of its proposed law.

Witness on cross-examination identified her husband's signature. She knew that he wrote the resolution.

At the April 30th meeting a collection was taken

up to defray the expenses of getting out the circular to oppose the passage of the Conscription Act. As to whether a committee was appointed she could not say. She did not know who wrote the cricular, only that her husband did not write it. She could not say whether the circular was read before she arrived, but supposed that it had been because Mr. Wells took it home with him.

Everybody was talking about the circular during the time that she was there. She was there when her husband took the circular from the table. She could not tell who had charge of it before he took it.

It was not a formal meeting, where you have presiding officers, but was simply an informal discussion following dinner at the cafeteria. The circular was upon a table upon which dinner had been served.

Asked by Mr. Reames as to how long the circular lay upon the table before her husband picked it up, witness replied that her husband was late, had just come in; that was then ready for printing.

Her husband picked up the manuscript, read it over, criticised the form of it in a discussion in which others joined, and then took it away with him. Joe and Morris Pass were recalled for further cross-examination by Mr. Reames to ask how soon after reaching New York were they arrested. They replied about three or four weeks.

Joe Pass was asked whether questions and an-

swers were put to him and answered in New York City in a secret service office, that were not brought out in the transcription. Joe Pass replied that there was one question that he was distinctly asked half a dozen times, to-wit: Whether he was present in the Epler Block when distribution took place. He told them no, and that this question was not contained in the transcript; that the secret service officers had cut it out.

Here the defense rested.

This was substantially all the evidence offered by the defense in support of this case in chief.

Plaintiff then offered FRANK B. GREENE, who testified that the statement made by witness Joe Pass that something had been taken out by the secret service operatives in New York was false.

This witness then said that Morris Pass said in New York that he was present when the circulars were divided up for distribution and volunteers came to the table and took them from time to time from the table. Wells was there in the earlier part of the distribution. Morris Pass took some of them.

Mr. Bell, on cross-examination, asked this question: "Morris Pass was interrogated with reference to the Epler Building meeting."

Mr. Greene replied as follows:

"If it is in the testimony; yes."

"Q. Haven't you any recollection of it?

A. No.

Q. None whatever?

I would like to examine this testimony. (Examining counsel looked at transcript.)

A. I may add that the Epler Block was not referred to by name."

At this point Mr. Reames offered the transcript as testimony containing the questions propounded to the defendant Joe Pass in the office of the U. S. secret service, together with his answers.

Mr. Bell objected on the ground that the witness should testify from his recollection and from that only, stating that he could have recourse to notes made at the time for one purpose only, viz., that of refreshing his memory, and that the witness could not make his own notes and then introduce them.

Mr. Bell argued that the question asked of the witness by Mr. Bell was whether his notes indicated any question propounded defendant Joe Pass upon the very matter which he was brought from New York for examination, and that the witness stated that they did not.

Mr. Bell then said his purpose was to show that this particular question was not asked of Joe Pass or that if said questions were asked they were eliminated from the transcript.

Thereupon, the court overruled Mr. Bells' objection and admitted in evidence the entire transcript of the testimony of Joe Pass in his exami-

nation in New York City, which witness testified contained the full, true and correct statement of all questions propounded to and answers made by him in the office of the secret service of the U. S. in New York City as Plaintiff's Exhibit 11.

Thereupon Mr. Bell, for the defense, took an exception which exception was allowed.

Mr. Bell further offered to cross-examine witness concerning the transcript ,which had then been offered in evidence, stating particularly that Joe Pass had been asked on the witness stand, while testifying for the defendants, whether or not he had been interrogated in New York City as to the meeting at which the circulars were distributed in the room in the Epler Block on May 11th. That a number of questions were put to him and answers given in response.

Mr. Bell then asked Mr. Greene (the Plaintiff's Rebuttal Witness) whether the transcript showed that these particular questions were asked the defendant, Joe Pass, while in New York. Witness replied that the transcript did not. Mr. Bell then stated in his judgment that should settle the matter.

Mr. Bell then offered to show by the witness, Greene, that Joe Pass was interrogated in New York in regard to the first meeting held in reference to the circular, but that the record fails to show that he was interrogated with reference to the sec-

ond meeting where the circulars were brought and distibuted.

The court then stated that the transcript would speak for itself. It would show what was in the record and what was not in it and refused to allow Mr. Bell to cross-examine the witness concerning the transcript. Mr. Bell then took an exception to the court's rejection of his offer.

Thereupon Mr. Bell moved for a directed verdict of not guilty for all of the defendants. In reply the court remarked:

"Let the record show a motion for directed verdict for all the defendants is denied and exception allowed."

Thereupon, both sides rested.

This was substantially all the evidence offered by the parties.

Within the time limited by the rule of the court for the presentation of requests for instructions and in the presence of the jury the defendant requested the court to give to the jury as instructions all of the instructions that had been theretofore requested by the defense at a former trial in case No. 5671, entitled "The United States of America vs. Hulet M. Wells, R. E. Rice, Sam Sadler and Aaron Fislerman," insofar as such requested instructions should be applicable to the present case, considering the difference in the indictments, and it was agreed between the Government, the de-

fense and the court that such request should be deemed and taken by all as a sufficient request for the giving of said instructions.

The following are the instructions requested by the defense in said case No. 3671 and referred to above, to-wit:

"United States District Court, etc., No. 3671.

Instructions Requested by Defendants.

INSTRUCTION NO. 1.

I instruct you to find the defendant, Hulet M. Wells, not guilty.

INSTRUCTION NO. 2.

I instruct you to find the defendant, R. E. Rice, not guilty.

INSTRUCTION NO. 3.

I instruct you to find the defendant, Sam Sadler, not guilty.

INSTRUCTION NO. 4.

I instruct you to find the defendant, Aaron Fislerman, not guilty.

INSTRUCTION NO. 5.

I instruct you to find the defendants not guilty under Court 1 of this indictment.

INSTRUCTION NO. 6.

I instruct you to find the defendants not guilty under Count III of this indictment.

INSTRUCTION NO. 7.

I instruct you to find the defendants not guilty under Count V of this indictment.

INSTRUCTION NO. 8.

The first element of the crime of conspiracy, namely, the conspiring together, confederating together or agreement together is one of the essentials of the crime. By this is meant an intelligent, mutual agreement or understanding to co-operate for the purpose of carrying out some pre-conceived plan. There must be some agreement to co-operate, there must be some meeting of the minds of the conspirators. Each of the conspirators must know that the other conspirator is going to do something to accomplish the end of the conspiracy. Mere knowledge that another or others are about to commit or about to attempt a crime, will not make one a conspirator. The mere haphazard doing of acts by persons acting independently does not constitute a conspiracy even though the acts done may tend to one end and even though each person may know of the other's act.

INSTRUCTION NO. 9.

I instruct you that the first count of the indictment in this case charges that the defendants conspired in violation of the provisions of Section 37 of the Penal Code of the United States to violate the provisions of Section 211 of the Penal Code of the United States as amended by Section 2 of the Act of March 4th, 1911. Section 37 referred to provides that whenever two or more persons shall conspire * * * to commit an offense against the United

States and one or more of said persons shall do any act to accomplish the purpose of said conspiracy shall be guilty, etc.

Count 1 of the indictment, insofar as it is material for your consideration, charges that on the 1st day of May, 1917, the defendants did conspire to print and distribute throughout the City of Seattle, a certain printed publication referred to as a "No Conscription" circular with the intention that the persons receiving the same should knowingly deposit and cause the same to be deposited for mailing, and knowingly take and cause the same to be taken from the United States mails, and it is alleged that said "No Conscription" circular was of a character that would incite arson, murder and assassination.

In a word this count of the indictment charges a conspiracy to use the mails in violation of the statutes I have heretofore quoted, prohibiting the mailing or receiving of certain non-mailable matters. The entire jurisdiction of the United States Government and of this court depends upon the question whether in planning to circulate or distribute the pamphlet in question, the defendants intended that the mails should be employed. If you have a reasonable doubt upon this point, as I shall hereafter define the term, I instruct you that you must find the defendants not guilty on count one, notwithstanding you may believe they planned to cir-

culate and distribute the pamphlet in question by other means.

INSTRUCTION NO. 10.

I instruct you that Count I of the indictment charges that the defendants conspired to cause other persons to deposit in the mails and take from the mails, a certain circular which has been designated as the "No Conscription" circular. This is the issue upon which must be determined the question of the defendants' guilt, or innocence. In determining this issue you will not consider at all the question whether it was contemplated or planned that certain other letters, books, pamphlets or papers should be so deposited in or received from the mails. There is no sufficient charge in the indictment that any other letters, books, pamphlets or papers of an indecent character were to be deposited or taken from the mails, neither is there any evidence of such a plan, and so I want to caution you particularly that you will not even consider whether such a plan existed, and unless you find from the evidence in the case beyond a reasonable doubt that the defendants or some of them planned and intended that this particular circular should be deposited in or taken from the mail, you will find the defendants not guilty.

INSTRUCTION NO. 11.

I instruct you that Article I of the Amendments to the Constitution of the United States provides

that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances." That one of the inalienable rights of every American citizen which even the Congress of the United States is powerless to abridge is the right to peaceably assemble and petition Congress or individual representatives in Congress upon any matter of legislation whether the same be still pending and under consideration by that body, or whether the same shall have been finally passed and enacted into law, and whether the purpose of the petition be to defeat the passage of such act or to secure its amendment or repeal, and under no circumstances can the exercise of this right in good faith be considered criminal or even unlawful. It is likewise the inalienable right and privilege of all persons whether they act singly or collectively, to speak and write freely upon all questions of public importance and in so doing they are fully protected by the provisions of the Constitution I have just quoted, so far as you are concerned with the question in this case, so long as they do not advocate, advise or encourage the use of force in hindering, opposing or delaying the exercise of some existing law of the United States, or do not advocate, advise or encourage forcible opposition to the

authority of the United States under such existing law.

It is extremely important that throughout all your deliberations in this case you should bear this point clearly in your minds. It is the policy of our law to permit at all times, and in all places, and under all circumstances the free discussion of all public questions, providing only that such discussion does not partake of the nature of advice or encouragement to resit existing law or existing authority, and neither the pendency of war nor any consideration of public necessity or patriotic duty can in any manner curtail or abridge this right of free discussion and free assemblage.

INSTRUCTION NO. 12.

I instruct you that the introduction on the 23rd day of May, 1917, before the Central Labor Council of the City of Seattle of the resolution which is set out in the indictment in this case was an ordinary exercise of the right of free speech and peaceable assemblage guaranteed to every person by the Constitution of the United States, and that you will not consider the same as in any sense unlawful or treat it as an overt act committed in pursuance of any unlawful conspiracy.

INSTRUCTION NO. 13.

I instruct you that the preparation and distribution of the "No Conscription" circular referred to in the indictment herein occurring prior to the final

passage of the Conscription or Selective Service Act on May 18, 1917, was not a violation of that act, nor did the preparation and distribution of said circular amount to a conspiracy to violate said act or to forcibly hinder, delay or oppose its execution because all of said acts preceded the passage of the act in question and as a matter of law a man cannot be guilty of conspiring to violate an act of Congress until after the same has been passed and approved and become a law.

INSTRUCTION NO. 14.

I instruct you that you will find the defendants not guilty under Count V of this indictment unless you find from the evidence in this case and beyond a reasonable doubt that after the 18th day of May, 1917, some two or more of said defendants conspired, confederated and agreed to induce others by force to hinder, delay and oppose the execution of the so-called "Conscription" or Selective Service Act.

INSTRUCTION NO. 15.

I instruct you that prior to the 18th day of May, 1917, neither the President of the United States nor any other person or body had any authority to call into the service of the United States or to organize the unorganized militia of the United States. The authority to organize and call such militia into service is vested by the Constitution of the United States solely in Congress and until

the 18th day of May, 1917, Congress had not exercised such authority. Prior to that date the only military forces which the President or any other officer of the United States had authority to call into service or to organize or direct in any manner were the regular naval forces, the regular army and the National Guard, and unless you believe from the evidence in this case beyond a reasonable doubt that it was the purpose of the defendants or of some one of the defendants acting in collusion and conspiracy with some other persons unknown, to forcibly oppose the authority of the Government in organizing and directing the regular naval forces, the regular or the National Guard, you will find all the defendants not guilty under Count III of the indictment.

INSTRUCTION NO. 16.

You will observe that in Count III of the indictment and more particularly on page 15, it is charged that the defendants conspired by force to oppose the authority of the United States and of the President of the United States in carrying into effect the provisions of the laws then existing relating to the armed military and naval forces, and such other laws as might thereafter be enacted in pursuance of the joint resolution of Congress declaring war. In this connection I wish to caution you that you cannot consider whether it was the purpose of the defendants or any of them, to pre-

vent, hinder and delay the execution of any law that had not yet been enacted, or to oppose the authority of the Government or of the President under anw law not yet enacted, for the reason that I have already explained, that a man cannot be guilty of a conspiracy to violate or obstruct or oppose laws which have not yet been enacted, nor can he be guilty of conspiring to oppose authority which has not yet been conferred; and so in determining the question of the defendants' guilty or innocence you must ignore entirely any statute, whether pending in Congress or not, which had not been finally enacted into law at the time the conspiracy is charged to have existed. More specifically, unless you find that a conspiracy existed between two or more of these defendants after the 18th day of May, you will entirely disregard and eliminate from your consideration in this case the Conscription or Selective Service Law, and you will not even consider the question whether the defendants or any of them, designed and intended to interfere with the operation and execution of such law.

INSTRUCTION NO. 17.

I instruct you that the Constitution and laws of the United States provide for two distinct kinds of military forces. The first is the regular paid, or professional soldier, such as is found in our regular standing naval and military forces; the second is known as the militia, which comprises the National

Guard and all other male citizens between the ages of 18 and 45, which are unorganized and known as the unorganized militia.

The Constitution of the United States provides that the militia, whether organized or unorganized, may be called forth by Congress only for the three following purposes: First, to execute the laws of the Union; second, to repress insurrection; and third, to repel invasions. The law makes no provision for calling forth the militia, whether organized or unorganized in a foreign war, and if it was the purpose of the so-called Conscription or Selective Service Act of May 18th to provide a body of troops for service in a foreign war and outside of the United States, then such law was unconstitutional and void. A void law is no law and is not entitled to either respect or obedience, and no person can be guilty of violating such a law or conspiring to violate the same.

INSTRUCTION NO. 18.

I instruct you that unless you find beyond a reasonable doubt that some two or more of the defendants after the 18th day of May, 1917, conspired to prevent, hinder and delay by force the execution of the Selective Service Act, or conspired to oppose by force the authority of the United States under that law, you will find the defendants not guilty on all the counts of this indictment.

INSTRUCTION NO. 19.

Every person accused of crime is presumed in law to be innocent of the crime charged until his guilt is proven by competent evidence to the satisfaction of the jury and beyond all reasonable doubt. This presumption is not a mere fiction which a jury may lightly disregard, but is a substantial right accorded by law to protect the innocent from unjust and unfounded accusations. It accompanies the defendant throughout the trial of the entire case. It follows therefore that you have no right to draw any inference of guilt from the fact that the grand jury has returned an indictment against these defendants, nor will you form your opinions of guilt or innocence as the evidence is being introduced during the trial, or util all of the evidence has been presented on both sides, and until you have been instructed by the court upon the law of the case, and you have finally retired to your jury room to deliberate upon your verdict.

INSTRUCTION NO. 20.

As I have already instructed you, the defendants in this case are presumed to be innocent until the contrary has been shown to your satisfaction beyond a reosonable doubt. It is not incumbent upon the defendants to prove their innocence. The burden rests upon the Government to prove their guilt. This burden never shifts to the defendant, and unless the Government has astisfactorily met

this requirement as to each defendant, the jury will acquit such defendant.

INSTRUCTION NO. 21.

I instruct you that in a criminal action you cannot base conviction upon mere probabilities, but before you can find any defendant guilty you must be satisfied of guilt beyond all reasonable doubt.

INSTRUCTION NO. 22.

In a criminal case it is not sufficient that the Government should prove its case by mere preponderance of the evidence, nor is it necessary, on the other hand, that it should prove its case positively and beyond all doubt. The law requires, however, that the Government should prove every material issue to your satisfaction and beyond all reasonable doubt. The expression "reasonable doubt" means in law just what the words ordinarily imply. To be reasonable, a doubt must be founded upon reason. In deliberating upon the evidence in this case you should not search for reasons for conviction, neither should you look for reasons for an acquittal. You will confine your deliberations solely to the evidence that has been admitted for your consideration. This evidence you will consider in the light of the instructions given you by the court. Ignoring all other things and disregarding all prejudices you should attempt fairly, conscientiously and honestly to ascertain the truth about the matters alleged in this indictment and if at the end of

your deliberations you have a reasonable doubt concerning any of the material matters alleged in the indictment, it will be your duty to acquit the defendants.

INSTRUCTION NO. 23.

Evidence is either direct or positive, or presumptive and circumstantial. When a witness testifies directly to the facts constituting the crime the evidence is said to be direct and positive. When he testifies to facts and circumstances having only an indirect relation to the facts constituting the crime, the evidence is presumptive and circumstantial. The commission of a crime may be proven either by the direct testimony of eye witnesses, or by circumstantial evidence; but when circumstantial evidence is relied on for a conviction, the circumstances should be consistent with each other. They must all be consistent with the defendant's guilt; and they must be inconsistent with any reasonable theory of the defendant's innocence. Evidence purely circumstantial in character which does not exclude every reasonable and rational theory of the defendant's innocence cannot, as a matter of law, be convincing beyond a reasonable doubt.

INSTRUCTION NO. 24.

Evidence has been received of the good reputation of the defendants for peace and quietude and as law-abiding citizens. You should consider such evidence, together with all of the other evidence in

the case, in arriving at your verdict; and if from such evidence you have a reasonable doubt concerning the defendants' guilt you should acquit.

INSTRUCTION NO. 25.

I instruct you that when you retire to consider your verdict in this case you must consider separately the evidence against each defendant and consider separately the question whether each defendant is guilty or innocent, and if you have a reasonable doubt about the guilt or innocence of any defendant, it will be your duty to find such defendant not guilty.

INSTRUCTION NO. 26.

I instruct you that you are the sole and exclusive judges of the facts of this case and of the credibility of the witnesses who appear before you. If, in the course of the trial, in ruling upon objections to evidence or upon motions made by counsel, the court may seem to you to have expressed an opinion upon any fact in this case, you will entirely disregard such matter. The court as such has no opinions about the facts and has not intended to express any. In determining the amount of credit which you will give to the testimony of the various witnesses who have appeared before you, you will consider their demeanor upon the witness stand; their apparent candor and fairness, or lack of it; the opportunities which they may have had for knowing the facts concerning which they have testi-

fied. You will be slow to believe that any witness has deliberately testified falsely, but if you do so believe, it will be your duty to entirely disregard the testimony of such witness, except insofar as the same may be corroborated by other credible evidence in the case.

INSTRUCTION NO. 27.

You will disregard entirely the fact that the defendants have made a motion for a directed verdict in their favor. In ruling upon this motion the court has not even considered whether the defendants, or any of them, were guilty or innocent. Again, I want to caution you that the court has no view upon this question and has not expressed any view in passing upon this motion. It is the court's province to pass upon, and instruct you regarding, the law in the case; and it is your province to decide the facts.

INSTRUCTION NO. 28.

In arriving at your verdict, you should consider separately the question of the guilt or innocence of each of the defendants charged; and if you have a reasonable doubt as to the guilt of one of the defendants, it is your duty to return a verdict of not guilty as to such defendant.

Except as the same be incorporated in the general charge of the court to the jury, the court refused to give any of said requested instructions to the jury, and to each separate refusal the defense asked and was allowed a separate exception.

Explanatory Note.

In cause No. 3671 there were four defendants, to-wit: Hulet M. Wells, Sam Sadler, R. E. Rice and Aaron Fislerman. The indictment therein contained five counts charging said defendants with the commission of offenses as follows: Count I, conspiracy to violate Section 211, Penal Code; Count II, conspiracy to violate Section 211, Penal Code; Count III, a violation of Section 6, Penal Code, by conspiring to prevent, hinder and delay the execution of the joint resolution of Congress approved April 6, 1917, declaring a state of war to exist, and the laws relating to the armed forces of the United States and appropriate for executing the said declaration of war, and to oppose by force the authority of the President in executing said law; Count IV, charged seditious conspiracy under Section 6, Penal Code, substantially the same as the charge set forth in Count III; Count V, charged seditious conspiracy under Section 6, Penal Code, to prevent, hinder and delay the execution of the Selective Service Law approved May 18, 1917. By appropriate proceedings and action counts one, two and five were withdrawn from the consideration of the jury and the case was submitted to the jury upon one count, to-wit: Count III. A verdict of "not guilty" was rendered as to the defendants R. E. Rice and Aaron Fislerman. The jury disagreed as to defendants Hulet M Wells and Sam Sadler.

The indictment in cause No. 3797 is in two counts, and sets forth substantially the charge embodied in Count III of the indictment in cause No. 3671. The transactions involved and the overt acts charged are substantially the same in cause No. 3671 and in cause No. 3797. In the last named case were included two other defendants, Morris Pass and Joseph Pass, who had not been defendants in cause No. 3671.

After the arguments of counsel, the court charged the jury as follows:

"By NETERER, Judge:

GENTLEMEN OF THE JURY: The issue to be determined in this case is one of great importance to the Government and to the defendants, and requires your careful consideration. Each party in this case has examined you with relation to prejudice, preconceived notions, of this issue, and you have convinced both sides that you are free from any prejudice and can determine this issue solely upon the evidence which has been presented, and both sides have a right to rely upon this conception of your qualifications; and I have no doubt that you will eliminate from your minds every element which would have a tendency to detract from the issue and will concentrate your thought alone upon the determination to do justice and right, as your quickened conscience, aroused by the serious duty before you, may dictate, your every thought

and effort being divorced from passion, prejudice, sympathy, or sense of relation to things which might detract your thought from the real issue in this case, and that is the guilt of innocence of the defendants, and by a fair, honest and conscientious consideration conclude, so that the Government and the defendants may feel that fair and honest consideration has been given to the matter in hand.

You can readily understand that the Government can only be maintained by the enforcement of the law. You, as jurors, are not concerned with the policy of the law. You are simply concerned with the facts as applicable to the law which has been passed by Congress. You appreciate that if the Congress, the law-making body, enacts a law defining a particular policy or rule of conduct, it believes it to be to the best interest and welfare of the country; and if people should decline to fairly and honestly live up to the law or discharge their duty by enforcing the law, that it would only be a short time until a condition of anarchy would obtain and no stable government could be maintained. On the other hand, you are instructed that the Government does not desire to have a jury conclude against a person on trial unless the conclusion is supported by the evidence. In other words, the Government does not desire to have an innocent man convicted. It is just as much interested in having an innocent man acquitted as it is in having

a guilty man convicted; but it does not want a guilty man to escape when the testimony shows beyond a reasonable doubt that he is guilty. So jealous is the Government of the liberty of a party charged with an offense, and so interested in the innocence of parties, that the law surrounds every man charged with an offense with the presumption of innocence until he is proven guilty, and also places upon the Government the burden of proving a party guilty beyond every reasonable doubt.

The gist of the offense charged is a conspiracy entered into on or about April 25, 1917, by force to prevent, hinder, or delay the execution of the law of the United States.

A conspiracy is defined as a combination or confederation of two or more persons, by concerted action, to do an unlawful thing, or to do a lawful thing in an unlawful manner; and the indictment charges the doing of overt acts in furtherance of the conspiracy, or some act for the purpose of carrying out the conspiracy. In other words, if you should find a conspiracy was entered into as charged, and that some one of the defendants or some persons unknown, disclosed by the evidence, who entered into the conspiracy, did some overt act in furtherance of it, then all of the defendants who entered into the conspiracy or became party to the conspiracy after it was formed, would be guilty. To make the statute clearer if possible, I will state the

three essential elements: First, the conspiring together of two or more persons, that is the element of intelligent, mutual agreement or understanding to co-operate for the purpose of carrying out some preconceived plan; second, to commit the offense charged, which in this case is to prevent, hinder or delay the execution of the law of the United States as charged in the indictment; and, third, the doing of what is termed the overt act, or the element of one or more of the defendants doing one or more of such acts to effectuate the objects of the conspiracy. The common design is the essence of the charge, and while it is necessary to establish the conspiracy to prove the combination of two or more persons to accomplish the unlawful purpose and that there was a confederation and agreement together and a preconceived plan, it is not necessary that two or more persons should meet together and enter into a written agreement or a definite verbal understanding or that they should formally in words or writing state what the unlawful scheme was to be or the general understanding or detail or plan or means by which the unlawful combination was to be effected or the part each was to play. It is sufficient if two or more persons in any manner positively or tacitly come to a mutual understanding to accomplish a common unlawful preconceived design or purpose, and if they proceed on such mutual understanding, each to participate in some manner, al-

though in a very minor way, and proceed to carry out the preconceived plan, and the acts of the parties so dovetail and fit together that the conclusion is inevitable that there was an understanding between the parties as to the thing to be done and the statute to be violated, a conspiracy would be established. In other words, where an unlawful object is sought to be effected and two or more persons, actuated by a common purpose and pursuing a preconceived plan to accomplish such purpose, should work together in any way in furtherance of the unlawful scheme, every such person participating is a party to the conspiracy, no matter what part he takes in the execution of the object and plan; and where several persons are proven to have combined together for the same illegal purpose, any act done by any one of the parties in furtherance of the original concerted plan and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and any declaration or statement made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proven, are as much responsible for such declaration and the acts to which it relates, as if made or done by themselves. You are further instructed that a party who comes into a conspiracy, as I have stated, after it is formed, with a full knowledge of the object and purposes,

and aids in carrying out the original design, thereby adopts all of the acts done prior to that time, and is as much a member of the conspiracy as though he had entered it from the beginning.

The indictment in this case contains two counts, but only one offense is stated. These counts will be considered by the court as one offense or consolidated into one and so treated.

The particular charge is that the defendants conspired to oppose by force, and to prevent, hinder, and delay the execution of a joint resolution of Congress declaring a condition of war to exist between this country and the Imperial German Government, and the National Defense Act and other acts set out in the indictment.

You are instructed that on the 6th day of April, 1917, the Congress of the United States passed a resolution in which it was stated:

"That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared, and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government; and to bring the conflict to a successful termination, all the resources of the country are hereby pledged by the Congress of the United States."

Prior to the passage of this resolution, the

Congress had likewise passed what is called the National Defense Act, of June 3, 1916, Section 57 of which provides that:

"The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or who shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age, and, except as hereinafter provided, not more than 45 years of age, and said militia shall be divided into three classes, the national guard, the naval militia, and the unorganized militia."

And by the same act, by Section 79, it is provided that:

"If for any reason there shall not be enough voluntary enlistments to keep the reserve battalions at the prescribed strength, a sufficient number of unorganized militia may be drafted into the service of the United States to maintain such of the said battalions at the proper strength."

The law likewise makes it the duty of the President, whenever the United States is in danger of invasion from any foreign nation, to call forth such number of the militia as may be deemed necessary by the act of January 21, 1903, as amended May 27, 1908 (U. S. Compiled Stat., Vol. 4, page 4296), to which I have just referred. To concisely state the law, then, on the 25th day of April, Congress had

declared the existence of a condition of war and directed the President to employ the entire naval and military forces of the United States and the resources of the Government to carry on the war against the Imperial German Government. At this time the law provided for distinct military and naval forces: First, the regular standing army and the military forces, and, second, the male citizens of the United States between eighteen and forty-five years of age, classified into the National Guard and Naval Militia and Unorganized Militia, and further provided for the drafting of a sufficient number of the unorganized militia into the service of the United States where there were not enough voluntary enlistments to keep the reserve battalions at the prescribed strength.

This conspiracy, if any was formed, cannot be brought forward and made to offend against the Conscription Act of May 18, 1917. The issue is whether the defendants did conspire to oppose by force and to prevent, hinder and delay the President of the United States in carrying out this resolution of Congress under the law as it existed at the time charged in this indictment and prior to the 18th day of May; and in considering this you will take into consideration all of the evidence which has been offered and admitted, and if you are convinced beyond a reasonable doubt that the object and purpose of the defendants was by force to pre-

vent, hinder and delay the President in employing the entire naval and military forces of the United States in the prosecution of the war against the Imperial German Government as charged, then the defendants who participated in such conspiracy would be guilty; and in this connection you will have in mind the power and authority to secure enlistments from the unorganized militia and the power to draft into the service of the United States from the unorganized militia a sufficient part to maintain the battalions at the proper strength.

If you believe or if you have reasonable doubt as to whether the "No Conscription" circular set out in the indictment and admitted in evidence did not purpose to oppose by force or incite others to oppose by force and hinder and delay the President in the execution of the joint resolution of Congress, then, of course, you will not consider it in that connection. But if you believe beyond a reasonable doubt that the purpose and effect of the circular was to incite others by force to oppose, hinder and delay the execution of such resolution, then such defendants who entered into such conspiracy would be guilty. In this connection I think I should say that the defendants are presumed to know the law and cannot shield themselves behind ignorance of the law. The law requires that all persons know what the law is. You are also instructed that every person is presumed to intend the natural conse-

quences or results of his acts deliberately or knowingly done.

As stated, the indictment charges the defendants with conspiring to oppose by force the authority of the United States, and to hinder and delay the execution of its laws. You are instructed that this is an element which must be established by the testimony on the part of the Government by the same degree of proof.

Force need not be actual physical force manifested by the defendants, but must be such conduct, either acts, statements, invitations or solicitations, the evident purpose of which is to incite others to the use of forcible resistance in hindering or delaying the Government of the United States in the execution of its laws. It is not essential that the object of the conspiracy should actually have been accomplished, or that force should actually have been used. Nor is it essential that the conspirators should have agreed upon the precise method of employing force or the weapons or instruments of such force. If a conspiracy was formed and the use of force was the natural or necessary means of accomplishing the object of the conspiracy, and if its use was necessarily incident to the carrying out of the plan of the conspiracy, whether that force should be used by the defendants or only by those persons who should be induced to co-operate with them, then the defendants would be guilty of the offense

charged. Nor can the effect of the circular be neutralized or limited by any motive or purpose or intent not communicated with the circular. Nor could what Webster or anyone else said enter into this issue or limit the effect of the circular, if the natural and reasonable conclusion to be deduced from the circular in evidence and what was done with it was to incite by force opposition to the law of the United States as charged. I think I should say in this connection, in view of the suggestions during the trial and argument, that you are not concerned in this case whether the war is right or not. We are at war now. There are only two sides to the war. One side is in favor of this country; the other side is against it. The policy of the Government has been declared and established, and no person can by force do anything that will hinder or delay the Government in carrying out that policy set out and defined in the resolution referred to in the indictment. The defendants are not charged with being against or in favor of the war, but with conspiracy by force to oppose, hinder or delay the Government of the United States in the execution of the resolution passed by the Congress with relation to the war and in carrying it to a successful termination. I think I should further say that Socialism or the Socialist party is not on trial in this cause; nor the Peace Society to which reference has been made in this trial, as such. The defend-

ants have a right to belong to the Socialist party or to the Peace Society referred to, and to advocate the doctrines of those organizations by lawful means; but they have no right under the name of either organization or under the guise of aiding either, or otherwise, to combine by force to hinder or delay the Government in the prosecution of the war. Nor is the mere fact, if such is established, of an innocent spectator at any meeting disclosed by the testimony where any matters were considered or discussed with relation to the circular or to any co-operation or conduct of any of the defendants or of the charges made, who did not participate in any of the proceedings or activity in carrying out the design and purpose of the scheme, if one was agreed upon—such parties, if there were such of the defendants, would not be guilty of the offense charged.

In this case, if you believe from the evidence or have a reasonable doubt as to whether the defendant Jos Pass or the defendant Sadler were mere innocent spectators and casual visitors at a meeting or meetings where the circular in evidence was considered and discussed and disposed of, and had no further interest or participation in the carrying out of any design or plan, if you find that one was agreed upon, and these parties or either of them did nothing to further the enterprise, such presence without any further interest or activity would not be sufficient to connect them with the con-

spiracy, if you find from the evidence one was formed by either of the defendants. You will consider all of the evidence with relation to each of the defendants with a view of determining just what connection, if any, they had with the charge made, and the activity of each in forwarding the plan or scheme, if you find one was formed.

If you believe from the evidence that a conspiracy was formed by Wells or by Morris Pass or by Wells and others disclosed by the evidence, and that after the formation of this conspiracy the defendants Sadler and Pass, if they were not present at the meeting or not members of any confederation or conspiracy, if you find one was formed, but afterwards either or both joined such conspiracy with full knowledge of its purposes, then they would be as guilty as though they have been members of the conspiracy from the beginning.

In deliberating upon the charge in the indictment, you will take into consideration the law which was then in force as already defined to you, and the authority and direction given to the President of the United States by Congress, and the testimony which has been offered and admitted as to what the defendants did, what they said, what effect what they did and what they said would have upon others in the relation disclosed by the testimony, having in mind the persons among whom the circular was distributed and the effect

it would likely have upon such persons as are disclosed by the evidence in this case. In this connection you are instructed that persons are not denied the right of petition, freedom of speech, or the right of peaceable assemblage. These are rights which are inalienable, and if exercised within the provisions of the law they can not be denied. The defendants had the right of freedom of speech and lawful assemblage and to petition Congress or to do anything to alleviate any grievances, so long as they did not advocate or advise or encourage the use of force in opposing, hindering or delaying the execution of the law of the United States as charged in the indictment. The defendant Wells had a right to address Dr. Strong's church, as testified to by one of the witnesses. He had a right to do or say anything in advocating the repeal of the law or its amendment, to write to Congressmen and to induce others to write to Congressmen, so long as he acted within the provisions of the law. But in this indictment he is charged with acting without the provisions of the law, and that is the issue which is now before you. All citizens are free to express their views on all public questions so long as they are actuated by honest purposes and not for the purpose of transgressing the rights of others, the laws of the state, or obstructing by force the execution of the laws of the United States; but no person has a right

to convert the liberty of speech into a license or to carry it to a point where it interferes with the due execution of the law, where his opposition is not honest, and where he is not actuated by an intention of expressing his views, but is manifested by an intent to violate the rights of others or the laws of the United States. A person may say or do anything not in itself unlawful to prevent the passage of a law or to secure the repeal of one already passed, but after a law is passed it is every man's duty to conform his acts in accordance with the provisions of the law, and he may not for the purpose of creating sentiment against the wisdom of the law do anything with intent to procure the violation of the law by force in his advocacy of its unwisdom or for the purpose of repeal.

The law with relation to the freedom of speech was recently commented upon by another judge (Judge Wolverton) which I fully approve. In referring to the constitution, he says:

"That instrument does decleare that Congress shall make no law abridging freedom of speech. The guarantee is a blessing to the people of this Government, and great latitude is preserved to them in the exercise of that right. But a citizen may not use his tongue or his pen in such a way as to inflict legal injury upon his neighbor or another. Nor has any person the right, under the guarantee of freedom of speech, to shape his language

in such a way as to incite discord, riot, or rebellion, because such action leads to a breach of the peace, and disturbs good order and quietude in the community. Nor is he privileged to utter such language and sentiment as will lead to an infraction of law, for the laws of the land are designated to be observed, and not to be disregarded and overridden. Much less has he the privilege, no matter upon what claim or pretense, so to express himself, with wilful purpose, as to lead to the obstruction and resistance of the due execution of the laws of the country, or as will induce others to do so. A citizen is entitled to fairly criticise men and measures; that is, men in public office, whether of high or low degree, and laws and ordinances intended for the government of the people; even the constitution of his state or of the United States; this with a view, by the use of lawful means, to improve the public service, or to amend the laws by which he is governed, or to which he is subjected. But when his criticism extends, or leads by wilful intent, to the incitment of disorder and riot, or to the infraction of the laws of the land or the constitution of this country, or with wilful purpose, to the resistance and obstruction of the due execution of the laws by the proper authorities, it overleaps the bounds of all reasonable liberty accorded to him by the guarantee of the freedom of speech, and this because the very means adopted is an unlawful exercise of his privilege."

In this case you will consider the guilt or innocence of each of the defendants separately with a view to determining their guilt or innocence, and the burden, as I have stated, is upon the Government to establish the material allegations of the charge in the indictment beyond a reasonable doubt.

The term "reasonable doubt" means in the law just what the words ordinarily imply. It means a doubt for which you can give a reason. It is such a doubt as a man of ordinary prudence, sensibility, and decision in determining an issue of like concern to himself as that before the jury to the defendants, which would make him pause or hesitate in arriving at his conclusion. But such a doubt should be entertained only from the want of such evidence to satisfy you beyond every reasonable doubt, or a doubt which is raised by the evidence itself, and should not be merely speculative, imaginary, or conjectural. A juror is satisfied beyond every reasonable doubt if from a candid consideration of the entire evidence which has been offered and admitted, direct and circumstantial, he has an abiding conviction of the truth of the charge made. When a juror is satisfied to a moral certainty of the guilt of the party charged, then he is satisfied beyond a reasonable doubt.

In this case in deliberating upon the evidence you will not search for reasons for acquittal nor look for reasons for conviction. You will confine

your deliberations solely to the evidence which has been admitted for your consideration, and this you will consider in the light of the instructions given you, ignoring all other things and disregarding all prejudice, and give the issue fair, honest conscientious consideration with a view of determining what the truth is with relation to the charge made.

Evidence, as you may have inferred, is either direct and positive or presumptive and circumstantial. When a witness testified directly to the facts constituting a crime, the evidence is said to be direct and positive. When he testifies to facts and circumstances having only an indirect relation to the facts constituting the crime, the evidence is said to be presumptive and circumstantial. The commission of a crime may be proven by direct testimony,—that is, the testimony of persons who saw or heard,—or by circumstantial evidence. Circumstantial evidence is the proof of such facts and circumstances which interlock and dovetail into each other with relation to the defendants and the charge made as bears upon the guilt or innocence of the defendants; and if these are sufficient to establish the guilt of the defendants beyond every reasonable doubt, then this evidence is sufficient to sustain a conviction. But the circumstances should be of such character and should so relate to the offense charged as to establish the guilt of the

defendants beyond every reasonable doubt, and to exclude every reasonable hypothesis of innocence and every reasonable hypothesis except that of guilt.

Reference was frequently made during the trial and argument to the intent and purpose of the defendants with relation to the charge made. You are instructed that it is psychologically impossible to enter into the minds of the defendants and determine by practical demonstration the intent and purpose actuating the defendants. Acts sometimes speak louder than words, and therefore the law requires that all of the circumstances detailed by the witnesses surrounding the charge made and the defendants with relation thereto be considered by the jurors. In determining the intent and purpose which actuated the defendants in the line of conduct disclosed, it is necessary to take into consideration what they did together with what they said, and from all the surrounding circumstances relating to the acts charged determine the intent and purpose which must have actuated the defendants in the line of conduct disclosed by the testimony, having in mind the statements, the acts, the demeanor, and the presumption of law that a person intends the natural consequences of his acts knowingly done. This presumption is not conclusive. It is of probatory character, and should be considered with all the other

elements disclosed by the testimony in this cause. In a case of this character the jury may find from the facts and circumstances, together with the language used and the natural, ordinary, and necessary consequences of the acts done, the intent actuating the defendants.

You, gentlemen of the jury, are the sole judges of the facts in this case and must determine what the facts in the case are. It has not been my purpose and it is not my purpose to refer to any facts in the case, or to intimate to you any opinion I may have of the facts. If I have referred in my instructions to any fact or have conveyed to you any opinion I have of the facts, I desire you to disregard it.

You are likewise the sole judges of the credibility of the witnesses who have testified before you. This must necessarily follow so as to enable you to pass upon the facts disclosed. In determining the weight or credit which you desire to attach to the testimony of any witness who has testified before you, you will take into consideration the demeanor of the witness upon the witness stand, the opportunity of the witness for knowing the things about which he has testified, the reasonableness or unreasonableness of the story of the witness, his interest or lack of interest in the result of this controversy, and from all these facts and circumstances determine where, in your

judgment, the truth in this case lies. If you find that any witness has wilfully sworn falsely as to any material fact or circumstance involved in this case, you have a right to disregard his entire testimony, except as the same may be corroborated by other credible evidence.

In this case upon the rebuttal by the Government the court admitted a transcript of testimony taken in New York which had been excluded before. This was admitted because objection was made as to the correctness of the report of what did transpire and that some parts of the examination had been eliminated or not reported, while the other side contended that everything contended for appeared in the transcript. Now, this was admitted only for the purpose of determining whether the story that appears in this testimony is complete and whether the testimony of the witness who says that he heard the testimony and transcribed it correctly is probably correct or whether the contention of the defendants is probably correct, if you find that to be material in your deliberations. You will not consider that with relation to, or for any other purpose in this case. The statements that you will consider in this case, made by the defendants, if you find that any were made, you will take from the mouths of the witnesses that testified before you together with the cross examination that was made by the other side upon the trial, and

consider all of the,—you will consider all of the testimony fairly with a view to determining as twelve honest men what the fact is.

From your decision upon the facts in this case there is no appeal. You are the final judges of the facts in this case, so that neither the defendants nor the Government can appeal from your finding upon the facts. I simply suggest that to impress you with the responsibility that rests upon you, that you may fully and carefully weigh and consider all of the evidence that is before you.

It will require your entire number to agree upon a verdict; and when you have agreed upon a verdict you will cause the same to be signed by your foreman whom you will elect immediately upon retiring to the jury room.

There is just one other suggestion I desire to make, and that is this: Some reference was made in the trial, while no emphasis was placed upon it,—and I think I should say to you that being a conscientious objector to any law would not be any defense; and if, perchance, some of you may be impressed with the expression "conscientious objector," you will not give that any consideration in your deliberations in this case. Nor are you concerned with the penalty that is involved in this charge if a conviction should have been established. That is a matter which is not in your province; but that is a matter which the law places elsewhere.

You are just concerned with the facts in this case and nothing more."

The foregoing statement covers the court's entire instructions up to this point.

The court then inquired: "Are there any suggestions or corrections?"

Mr. Bell then replied: "In defining the essentials, you stated among other things that if they found the defendants conspired to hinder or delay the execution of a law of the United States, leaving out of that definition of the essentials one of the essential elements,—the element of force.

THE COURT: If I inadvertently omitted the term "force,"—

MR. REAMES: It is in there.

MR. BELL: We don't agree. I don't take my suggestions from Mr. Reames. I am excepting.

THE COURT: I am telling you that if I omitted I will include it now.

MR. BELL: I know Your Honor later referred to force, but in defining the essentials as I took it down at the time it was not included.

THE COURT: Very well.

MR. BELL: In the definition of force, the court told the jury that it need not be actual force. I take it that there could be no constructive force. In the face of this law, there is no such thing as constructive force. We therefore except to that.

THE COURT: I stated that it was necessary for the defendants to use actual force.

MR. BELL: We except to that portion of Your Honor's charge wherein he charged the jury that knowledge of existing law or laws would be inferred on the part of the defendants as bearing upon the intent, for the reason that the matter of intent would be a matter of proof and not of inference. We except again to Your Honor's instruction on the question of freedom of speech, for the reason that the question of freedom of speech, is not involved in the issues in this case, and instructions in that particular would have a tendency to confuse the minds of the jurors; and particularly that part of the instructions wherein Your Honor spoke of inciting to riots and disorder. All the incitations to riots and disorder in the world would not bring the defendants within the charge in this particular case and within the charge in the indictment.

THE COURT (to the Jury): You are instructed that the reference to freedom of speech should only apply to this circular,—that "No Conscription" circular which has been offered in evidence. Any reference in the instructions with relation to inciting to riot was simply given as a general definition of the term so that you will understand it, and you will understand that the reference should only apply to the charge in the indictment,—that is, the conspiracy to, by force, hinder and delay the Government as charged.

One form of verdict will be submitted. Some of the defendants are either guilty or not guilty. I mean that the defendants are either guilty or not guilty. Both counts are considered as one. You will simply write in the blank in the form after the name of each defendant the word "is" or "not," as you may conclude.

Mr. Bell's conference before arguments in which the court agreed to consider the instructions in the first case as offered, refused and exception allowed, took place while the jury was in the court room, and the exception noted to the instructions as given were taken in the presence of the jury before it retired to a consideration of the case.

Thereupon the jury retired to consider their verdict, and having returned into court a verdict of guilty against all of the defendants upon both counts in the indictment, the court on the 18th day of March, A. D. 1918, entered its judgment and sentence upon the verdict, which already appears of record in said cause.

And now in furtherance of justice and that right may be done the defendants and each of them and forasmuch as foregoing facts do not appear fully of record the defendants and each of them pray that this, their Bill of Exceptions, may be settled, allowed, signed and sealed by the court and made a part of the record and the same is accordingly done this 19th day of June, A. D. 1918.

JEREMIAH NETERER,
United States District Judge.

Service of within Bill of Exceptions and receipt of copy admitted this 29th day of April, 1918.

CLARENCE L. REAMES,
Attorney for U. S.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 19, 1918.

FRANK L. CROSBY, Clerk.
By ED M. LAKIN, Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 3797.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOSEPH PASS,
Defendants.

Proposed Amendments to Defendants' Proposed Bill of Exceptions.

To defendants, Hulet M. Wells, Sam Sadler, Morris Pass and Joseph Pass, and each of them and to their attorneys:

You and each of you will please take notice that the following amendments are hereby proposed on the part of the plaintiff to the bill of exceptions proposed by the defendants, to-wit:

Page 2, line 25. After the words "Mr. Wells" add "Witness testified that leaving out the shop

number on the union label would make it a little difficult to find where the circular was printed."

Page 3, line 3. After "meeting" add "And Wells and Sadler were present during the discussion of the No-Conscription circular which took place at said meeting and which witness then heard."

Page 3, line 3. Strike sentence beginning "The matter of the ten proposed National Draft Act, etc.;" and the next sentence beginning, "It was stated generally, etc.," substitute, "Almost all the talk was along the line that there was about to be passed a law of universal conscription and that before the law was signed was the time to get action against it and not afterwards."

Page 3, line 15. Strike "a big bundle of these circulars in the room" and substitute "on the table right in front of him two bundles of these circulars and picked out several and looked at them."

Page 3, line 20. Strike sentence beginning, "Witness could not remember" and ending "by the Assembly." Substitute therefor "Witness could not say what was said by Sadler other than that it was in accord with what Wells said as to the actions necessary in the distributing of the circulars."

Page 3, line 28. After words "Sunday morning" add the sentence, "Those present were vouched for by the following method: They were asked to rise. Then those who were universally known there

were asked to certify whether such persons were trustworthy or not."

Page 4, line 4. After the word "afterwards" add "Mr. Wells took a more active part in the meeting than the others. Possibly it might be said that he took the leading part, though possibly no more than several others."

Page 6, line 6. After the word "meeting" add the following sentences, "Those present were then vouched for in the following manner—some fellow would stand up and a fellow in the room that knew him more or less would say "I vouch for him." Witness thought somebody vouched for him, but couldn't say. It wasn't necessary because he was known to ten or twelve people present who were members of the Socialist party once upon a time."

Page 6, line 16. After last sentence on this line add following: Q. The idea was to arouse people so that they would reach the Representatives in Congress?

A. I don't know. Maybe some people made remarks of that sort. It was a sort of general conversation.

Q. On the subject of this secrecy or attempted secrecy, Mr. Wells, the defendant here, said it was foolish and scoffed at the idea.

A. Well, I was trying to think about that and somehow it must have escaped my mind, I might have been so, but I did not hear it."

Page 6, line 24. After word "Government" insert the sentence: "Witness attended the meeting in the Epler Block on May 11, 1917, at about 8 o'clock in the evening."

Page 7, line 4. After words "requested them" add "And if they desired to distribute any of these in the precincts, they would come and get the circulars, and there was a notation made of each one and the map was consulted with reference to certain precincts that were numerically numbered on the map.'

Page 4, line 7. After the word "them" add the following: "Wells made a brief address about these circulars and his reasons for them, and said that he wanted them distributed." Witness said: "It was the general sense of the meeting that there would not be enough people there to take all of the circulars. It was suggested that if anybody else would want any of them, they could get them at the Labor Temple the next morning."

Page 7, line 8. Strike the sentence beginning "Witness stated" and ending "he could not see." Substitute therefor the following, "The question came up as to whether there might be people in the meeting that were not in sympathy with them and might be spies, and that theretofore there had been trouble of that kind. And so it was finally agreed that those present would be vouched,—that is, someone would get up and another would say if

they were known, "I vouch for him." This method of vouching was then followed. The defendant Wells vouched for the witness. At this meeting it was said that it was advisable to have a sergeant-at-arms appointed so that someone else might not come in there that would not be in sympathy with them. This suggestion met with the approval of the meeting, because there were two serveants, the witness thought, at that time appointed. It was suggested that persons leaving the hall should go out singly and not let anyone know that they had those circulars given to distribute, or to show them to anyone until Sunday morning—until they distributed them. That was for fear somebody might get hold of them. This suggestion met with the general approval of this meeting, and witness could recall no objection being made to it. Witness did not know whether the suggestion was actually followed out."

Page 7, line 17. After the word "interrupted" add "and that the idea of secrecy was because of the fear of being interfered with either by rowdies or by the government or by anybody else."

Q. You do remember that when that talk was on Mr. Wells ridiculed the idea of secrecy openly in the meeting?

A. He might have done that.

Q. Didn't you testify to that in the last trial?

A. I might have done so. I don't think that I

testified point-blank because I don't recollect it. There was a good many speaking. I have been a member of the Socialist party myself and I know they all want to talk. They have all different ideas. You can't listen to their ideas all at one time. That seemed to be a kind of an open forum meeting and wasn't conducted as usual.

Q. A kind of free for all?

A. Yes, three or four were speaking at the same time.

Page 7, line 31. Strike the sentence beginning "Witness did not recall." Substitute therefor the following:

"Q. There was talk about reaching the various members of Congress in this state?

A. No. That was not brought up. That has always been the consensus of opinion of them.

Q. Wasn't it discussed at that meeting?

A. It might have been."

Page 8, line 4. After the word "handled," add "other than that he saw the circulars handed out at this meeting, and that they were received and wrapped up," and witness could not say that Wells or anybody else took any away.

Page 9, line 16. After the words "same," add "Witness explained this consolidation by saying that it was considered that 'the two subjects were co-related and the same interests that were seeking to bring about a big influx of coolie labor, were

the same interests that were behind the attempt to put over the Draft Law.' It was felt that they should be dealt with as one subject."

Page 10, line 8. After the words "set forth" insert the following:

"Q. You know that he left the meeting with you with a tacit understanding that if the circular was prepared by somebody, he would oversee the matter of printing it?

A. Yes, that was the impression that he left with them as he left."

Page 10, line 25. At the end of the paragraph add the following, "And there was no suggestion of vouching for or identifying the persons present. The meeting of May 23rd at the Labor Temple was an open public one where anyone could get in who sought admittance. At said meeting there was no suggestion of vouching for or identifying those present."

Page 10, line 31. After the sentence closing with the words "Hall No. 107," add, "This was on a Monday toward the latter part of May. Witness could not recall the exact date."

Page 12, line 11. Strike that portion beginning with words "remembered that Morris Pass" and ending on line 14 with the words "for that purpose." Substitute therefor the following: "Testified that Morris Pass said he had attended only two meetings. One of these meetings was in the

Good Eats Cafeteria. Morris had stated the date, but witness did not remember just what the date was. Morris Pass did not tell the witness that the second meeting was called for the purpose of protesting against the high cost of living and that that was what Morris attended it for. Morris had said something to witness about getting to the second meeting late after the meeting was in progress."

Page 12, line 15. Strike that portion beginning with the words "that Joe Pass said," and ending line 17 with the words "Epler Block or not." Substitute therefor, "Joe Pass said he was at two meetings. One of these was at the Good Eats Cafeteria. The Epler Block had not been referred to by that particular name when Joe had been interrogated about attending the meetings."

Page 13, line 2. Add at the end of the paragraph the following: "Joe Pass said that the meeting at which the draft of the circular was discussed was to be for the same purposes as outlined by the American Union against Militarism, and that Joe's purpose in attending was for that reason."

Page 18, line 23. After the word "objection," add the following, "saying; the objection to this question is sustained. That may open a collateral issue that is not here, and the question is so broad that the court must sustain the objection. Of course some of the matters suggested by you might

be proper, but under this question it would not be limited to the things that might be proper."

Page 21, lines 9 to 13. Strike the portions beginning, "The proposed manuscript" and ending "it was too strong," and substitute therefor the following, "Witness said, So, as I remember, this manuscript of the pamphlet that had been prepared was lying on the table where he (Morris Pass) was sitting. I am not sure whether it was in front of him or not; but I—after my wife refreshed my memory I recall it in this way, that we walked over to the table and got the circular there, looked over it and objected to one of the phrases that it contained, because I thought was too strong."

Page 21, line 17. After words "stricken out," add "witness said, 'I overlooked another clause which expressed the same idea that if we must fight and die, and so on, let it be here instead of over there.' "

Page 22, line 18. After words "Labor Temple," add "Witness said 'my wife who has a great deal better memory of details heard me testify and said I was mistaken,' that I got the pamphlet that night."

Page 22, line 20. After the words "May 4th," add "After witness received the copy for the circular he carried it around until he got money from Morris Pass to make a payment on the printing."

Page 23, line 24. After word "do," add "Wit-

ness said 'No, I didn't want to leave the circulars in the hall in the first instance, because I knew I would be late getting back from home, and there would be a good many people there and they would be opened up and scattered around and the people would be familiar with the contents, and I would not be able to hold their attention so well."

Page 24, line 8. After word "recollection," add "Witness said 'So I got up,—I expected to see Morris Pass there. I thought that he as secretary ought to have made arrangements. He wasn't there."

Page 24, line 24. After word "distribution," add "After hearing my talk on what our purposes were in trying to defeat the conscription law, as I regarded it anti-American, even those that came there for a different purpose expressed themselves in sympathy, and most of them took circulars."

Page 25, line 11. After the words "three days," add "On cross examination the following questions and answers were put to and made by defendant Wells:

"Q. Then at the time that you got it from him you read it over and objected to some of its phraseology relating to civil war?

A. Yes.

Q. You read the circular over at that time to the extent that you knew that there was some objectionable matter in it?

A. I certain didn't read it all over, or I would have struck out exactly the same phrase later on.

Q. You mean to say that you at that time simply read over the portion that you struck out?

A. Certainly, they told me I was to get the circular printed, and I went over and got the circular and glanced over this first part of it and noticed the phrase about civil war and struck it out.

Q. You didn't read the rest of the circular?

A. Not at that time, no."

Page 25, line 15. After word "superficially," add "In explanation of this term witness said, 'I would read those headlines in which I am accord. I would read about the construction and I would read the part from Daniel Webster. All that I would agree with. Reading hurriedly, that would give a general idea.' "

Page 25, line 28. After word "rezest," add "One place where the word 'as' inserted didn't make very good sense, witness could see that the word should be 'so'."

Page 26, line 2. After the word "office," add "There he wrote on the back of the proof the following words, 'Corrected proof. Would like circulars for Friday evening, and signed it 'Wells'."

Add further: "Witness' attention was then called to his testimony at the former trial where he was asked how the shop number came to be

stricken from the proof, and witness had then testified that he knew Mr. Listman to be cautious and conservative in his views and that Mr. Allen, U. S. Attorney, had been making rather flamboyant threats as to what they were going to do. Witness admitted that he had given such testimony at the former trial and that it was true."

Page 27, line 5. Strike the words "although he had not made a careful examination of it," and add the following "Witness did not know whether he got his general idea of the National Defense Act from reading it in the statutes or in the newspapers. He had no recollection of testifying at the former trial that he was familiar with the Act."

Page 27, line 20. Before the word "He's" and at and as the beginning of the sentence insert: "Witness testified that Morris Pass did not tell why he had been unable to rent a post-office box, and then."

Page 30, line 21. After the word "point," add "Witness said, 'It was suggested,—I remember one of the suggestions was that the circular ought to be very short and to the point, that it should just make one point. We thought we could cover only one,—whether the point should be made that the person getting it should write to Congress or whether the point presented should be that the person getting it should come to a mass meeting, caused some discussion.' "

Page 31, line 16. After the word "distribution," add "The suggestion was made that if all got out at one time before any one was up the effect of publicity would be better, as people would be in to ask of their neighbors, 'Did you get one.' "

Page 32, line 6. After the word "circular," add "Witness thought very likely that she contributed to that fund but could not know who was going to prepare and write the circular. That had not been decided. Her clearest recollection was that just as she was going the group at the other table was concerned over that with an endeavor to get two or three people there to take the burden. She did not know who wrote the circular.

The groups which attended this meeting was not very large. She did not remember who acted as chairman, because the regular president was not there. She was not certain whether one person acted as chairman all the time, nor whether it was a man or woman, but she was rather inclined to think it was a man.

Page 34, line 1. After the word "pamphlet," add "Witness testified that he had no connection with the matter other than what he had related on his direct examination."

Page 34, line 20. After the words "years of age," add "He had never declared his intention to become a citizen of the United States, nor had his father ever applied for citizenship."

Page 36, line 16. After the word "Pass," add "Witness was not known in Seattle as Morris Levine. Since his folks were in Seattle known as Pass, it wouldn't be appropriate for him to use a different name than his folks."

Page 36, line 7. After the word "building," add "on the Friday night before the Sunday on which the circulars were distributed. There is only one Socialist Headquarters in the Epler Block."

There were some loose circulars on the table. Witness was at this meeting late in the evening. He could not say whether the circulars there were the same as Government's Exhibit No. 6."

Witness' name is just Joe Pass. Leo or Levine is not his middle name. He has no middle name. Witness took the same name that Morris took because Morris had travelled under that name two summers before. Witness had never been on the road before. This was the first time that he had ever used an assumed name.

Witness never told any registration officers that his address was New York City. Witness did not tell the registration officers his name was Joe Pass until after he was arrested and out on bail.

Page 40, line 3. After the word "delivery," add "to which address witness direction, mail from his own family was sent. Witness' mail and Morris' mail even from members of their own family was

directed to General Delivery, New York City, as long as they stayed in New York. The first night in New York witness and his brother Morris stopped in a hotel. Then for the first week they went to some place on the West Side and resided there. After living a week on the West Side of New York they found quarters in Greenwich Village., 16 Christopher Street."

Page 40, line 31. After word "years," add "Witness had never declared his intention to become a citizen of the United States."

Page 41, line 11. After the word "used," add "Witness made the following answers to the following questions:

"Q. Did it strike you at that time peculiar that the leaflet was calling for armed resistance to the government of the United States?

A. Now, under the psychological effect that I was at that time, knowing the people that were present there, which were, by the way, quite a few church people and middle class—

Q. Why won't you tell us who they were?

A. Because I don't know their names. I know the type; they are Dr. Strong's type. If I would see him I would know he was a minister.

Q. Did you tell the meeting at that time as a literary critic that the meaning of the words that they were putting into this circular meant armed resistance to the government of the United States?

A. I didn't go into the full details.

Q. You didn't think it of enough importance?

A. I wasn't a member of the organization. Not being a member, I didn't think it proper to butt in."

Page 42, line 4. After word "present," add "If witness had considered what was taking place was wrong he probably would have said something by way of protest, but not with enough 'ginger.' Witness didn't think any crime was being committed."

Page 43, line 17. After the word "delegates," add "While witness was at the meeting in the Epler Block there was no discussion by anyone in reference to the No Conscription circulars."

Page 44, line 8. After the word "Block," add "There were two rooms in one with an archway. A person sitting in one room can only see on an angle on the other side of the room. The Socialists had no other headquarters in that building. If they had witness would have known it. He carried a key to the headquarters."

Page 44, line 28. After the word "law," add "There had been discussions. Witness thought Sadler might know, so he went to Sadler and asked the latter's advice whether witness should register in the event it became a law."

Page 47, line 18. At the beginning of the paragraph insert the following: "On cross examination witness said that Mr. Wells' attitude had always

been towards the enforcement of the law as written except as he could have it modified. Witness did not know specifically whether Mr. Wells was in accord with the principles of the Socialist Party relative to its war program. She did not know whether he was in accord with the specific declaration of the National Socialist Platform in which it says the declaration of war on the part of the government is a crime. She had never read the war platform of the Socialist party. Witness had never heard her husband say that the present war of the United States against the Imperial German Government is a crime."

Page 47, line 19. After the word "resolution," add "introduced in the Labor Temple on May 23d. Witness testified in response to question as follows:

'Q. Does the statement in this which was introduced after war was declared, that refers in express language to the war being fought in an unworthy cause, are those his sentiments?

A. I know that he wrote that resolution, and he read it to me. I can't vouch for that being in there.

Q. You admit those represent his true sentiments?

A. I think they do, if that is in there.' "

Page 47, line 26. After the word "him," add "Witness testified as follows:

'Q. Did you stay there throughout the entire

meeting?

A. It was not a very long meeting. I know we left before eight o'clock. I just went there and ate supper and stayed a little while.

Q. Did some person after you arrived read a draft of this circular?

A. Not that I know of.

Q. It has been testified to by a number of witnesses—

A. I told you that I went late.

Q. You went late?

A. Yes, I met Miss Strong as she was coming out.' "

Page 48, line 26. After the word "false," add the following: "Witness at the time of the examination of defendants Morris and Joe Pass in New York, had prepared and at the time of this trial had here a full and accurate statement of what said defendants had stated on said examination. Witness had put nothing into said statement that did not happen and had left out nothing that did happen."

Page 49, line 1. After word "then," and "and circulated them, Morris Pass did not recollect how many he had circulated. He had not left any in doorways or halls, or like that, but had just handed them to his friends. We had had about a dozen or two dozen of those circulars."

Page 49, line 13. After the word "name," add

the following:

"Q. In your presence a number of questions were asked Morris Pass in reference to the meeting in the Socialist Hall where the circulars referred to were distributed,—that is a fact, isn't it?

A. Where the circulars were distributed, yes sir.

Q. You did identify that meeting by the meeting where the circulars were distributed, didn't you?

A. Yes sir.

Q. He was asked a number of questions with reference to that meeting?

A. Yes sir.

Q. Why wasn't Joe Pass? Where are they?

A. I don't know, Mr. Bell; I didn't do the questioning.

Q. Don't you know why he was not interrogated on that subject?

A. He was questioned about the circulation, Mr. Bell.

Q. Yes; but not a question with reference to his attendance or non-attendance at that meeting is shown in that transcript,—that is a fact, isn't it?

A. If I may look over it (counsel hands transcript to witness).

THE COURT: Anything further?

MR. BELL: Yes, I am waiting for the witness to answer the question.

Q. There is nothing shown there?

A. I can't find any.

Q. If Joe Pass was asked whether or not he attended that meeting, it does not show in your notes?

A. No sir, I can't find it in here.

Q. And will you tell this jury why it was when these boys,—when these defendants Joe Pass and Morris Pass were being cross examined by those detectives, Joe Pass was not asked whether he attended the meeting in the Socialist Hall?

A. I don't know, sir.

Q. Isn't that what they were trying to find out?

A. I don't know. I was merely the stenographer at that meeting and not the questioner."

Page 50, line 30. After the word "exhibit," add the following: "The court, on the admission of said transcript in evidence said:

'The rule contended for by the defense is the one that has been adhered to by the court and is unquestionably the law. In my judgment, however, that has not application here. Here is a charge made that a part of the record has been suppressed, or that the witness upon the stand, is falsifying the record, or is falsifying the record and permitted to do that, perhaps, by his superiors. This now raises an issue of itself. The Government contends that the record as disclosed is a full, true and complete

record, not only of what did transpire, but likewise covers the field concerning which the inquiry was made. So upon that the record would speak for itself. And this is the issue that the jury must determine in weighing the testimony and credibility of the witness. Upon the objection made, and that is the only one, the court can consider I think the record should be admitted and an exception noted. This is simply the transcript with relation to Joe Pass.' "

Page 61, line 7. Strike all that portion beginning "at which the circulars were distributed—," and extending to and including the word "transcript," and substitute therefor and add the following, "which had been identified as held at the Good Eats Cafeteria. Witness replied, 'I believe so, if the statements show it.' "

The court then observed:

"THE COURT: Let me make this observation: If the witness is merely to be interrogated as to the contents of that record and the various phases of the inquiry, isn't that a matter of argument to be presented to the jury rather than of testimony?

MR. BELL: I had supposed that entire matter would be; but now that the transcript is in evidence, I want to cross examine, if I may, upon its contents.

THE COURT: The only purpose for which

that could be admitted, as I stated, would be to show the scope of the examination and whether the record discloses the scope contended for by the Government or the charge made by the defendants; and if there are any disclosures in the record that are foreign to this issue, why, those, of course, would not be considered by the jury in determining the facts in this case other than as it may bear upon the credibility of the testimony of this witness as to disclosures made by the witness heretofore.

MR. BELL: Your Honor will recall that Joe Pass was asked on the witness stand a few moments ago, whether or not he had been interrogated with reference to the second meeting,—the meeting at which the circular had been distributed. He said that he had been interrogated with reference to that meeting, that a number of questions were put to him and answers given by him. I then asked this witness whether the transcript showed any such question or answers, and he said that it did not. That, I take it, should have settled the matter because this evidence would show nothing.

THE COURT: I simply made that inquiry. If that is the only purpose, that would be a matter of argument rather than of testimony. If there is any other purpose, I don't know what it is.

MR. BELL: I simply wanted to bring out that this transcript made by this witness shows that Joe Pass was interrogated at New York in

reference to the meeting at the Good Eats Cafeteria, but fails to show that he was interrogated with reference to the meeting where the circulars were divided up for distribution.

THE COURT: You can point that out to the jury, as well as the witness can.

MR. BELL: I offer to show by this witness that at this meeting, Joe Pass was interrogated at New York in regard to the first meeting held in reference to the circular, but that this record fails to show that he was interrogated with reference to the second meeting where the circulars were brought and distributed.

THE COURT: The transcript would speak for itself. It would show what is in the record and what is not in the record."

BEN L. MOORE,
Assistant U. S. Attorney.

The above amendments to Bill of Exceptions, excepting therefrom portions stricken with red pencil, are hereby allowed as a part of the Bill of Exceptions settled and certified in said cause.

This June 19, 1918.

JEREMIAH NETERER,
Judge U. S. District Court.

O. K. WINTER S. MARTIN,
Atty for Defts.

Indorsed: Proposed Amendments to Defendants' Proposed Bill of Exceptions. Filed in the

U. S. District Court, Western Dist. of Washington, Northern Division, June 19, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

At Law. No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOE PASS,

Defendants.

Order Settling Bill of Exceptions.

Now, on this 19th day of June, 1918, the above cause came on for hearing on the application of the defendant to settle the bill of exceptions in this cause, counsel for both parties appearing and it appearing to the court that defendants' proposed bill of exceptions was duly served within the time provided by law and that the plaintiff's proposed amendments were also served within the time provided by law and the court having heard counsel and being advised:

Adopts the bill as proposed by the defendant together with the amendments proposed by the plaintiff and it appearing to the court that said bill of exceptions, as proposed by defendant, taken in connection with the amendments proposed by

the plaintiff and hereby adopted contains all of the material facts occurring upon the trial of said cause, together with the exceptions thereto and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence which are hereby made a part of said bill of exceptions and the clerk of this court is hereby ordered and instructed to attach the same hereto.

IT IS ORDERED that said proposed Bill of Exceptions, together with said amendments be and the same is hereby settled as a true Bill of Exceptions in this cause and the same is hereby certified accordingly by the undersigned, judge of this court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions and the clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

JEREMIAH NETERER,
Judge.

O. K. This June 19, 1918.

BEN L. MOORE,
Asst. U. S. Atty.

Indorsed: Order Settling Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 19, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

At Law. No. 3797.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOE PASS,
Defendants.

Petition For Writ of Error.

Come now the defendants above named and respectfully show:

That on the 21st day of February, 1918, a jury duly empanelled in the above entitled cause found a verdict of guilty against each of the defendants upon the indictment herein; that thereafter and on the 18th day of March, 1918, final judgment was pronounced and entered in said cause against each of said defendants, wherein and whereby it was adjudged that Hulet M. Wells be imprisoned in the United States penitentiary at McNeil's Island for the period of two (2) years; that Morris Pass be imprisoned at said place for the period of two (2) years; that Joseph Pass be imprisoned at said place for the period of two (2) years; and that Sam Sadler be imprisoned at said place for the period of two (2) years.

That on said judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the said de-

fendants, all of which will more in detail appear from the assignment of errors which is filed herewith.

Your petitioners, said defendants, feeling themselves aggrieved by said verdict and judgment entered thereon as aforesaid, herewith petition this Honorable Court for an order allowing them to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in such cases made and provided.

Wherefore your petitioners, said defendants, pray that a Writ of Error issue in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit aforesaid, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

WILSON R. GAY,
WINTER S. MARTIN,
Attorneys for Defendants.

Service of the foregoing petition and the receipt of a copy thereof is hereby admitted this 28th day of June, 1918.

BEN L. MOORE,
Assistant United States Attorney.

Indorsed: Petition for Writ of Error. Filed in the U. S. Dist. Court, Western Dist. of Washington,

Northern Division, June 28, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS, JOE PASS,

Defendants.

At Law. No. 3797.

Assignment of Errors.

Comes now the defendants and each of them in the above cause and file the following Assignment of Errors upon which they will rely upon the prosecution of Writ of Error herein to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment of conviction and sentence of the above entitled court, entered herein on the 18th day of March, A. D. 1918:

I.

The court erred in not discharging the jury and dismissing said defendants and each of them when the cause was called for trial and the jury empanelled for the reason that the indictment and each count thereof fails to charge an offense under the laws of the United States.

II.

The court erred in the admission of evidence

offered by the plaintiff in the following instance, to-wit:

a. James A. Duncan was next called by the plaintiff and testified among other things that he was present on the 23rd day of May, 1917, at a meeting of the Central Labor Council in Seattle and identified plaintiff's Exhibit VII—as a resolution offered before that body by defendant Wells. This resolution (Plaintiff's Exhibit VII) was offered in evidence by the prosecution, and thereupon Mr. Bell, attorney for defendants, objected upon the ground that it was immaterial and did not tend to prove any issue in the case. This resoultion (Plaintiff's Exhibit VII) was then admitted by the court over Mr. Bell's objection. An exception was allowed and noted.

b. C. J. Fraser was called as a witness for the prosecution and stated that he found a copy of Plaintiff's Exhibit VI, to-wit: The No-Conscription Circular, upon the front porch of his home, which was located about a block from the boundary line of the Fort Lawton Military Reservation, on Sunday morning, the 13th day of May, 1917. He was asked by the prosecution if he exhibited this circular to anyone else. Thereupon counsel for the defense objected upon the ground that the defendants were not shown to be responsible for the witness' exhibition of the circular. This objection was overruled and thereupon Mr. Bell, attorney

for defendants, excepted, which exception was allowed.

c. Mrs. C. J. Fraser, wife of the witness above named, was called as the next witness for the plaintiff. She recognized Plaintiff's Exhibit VI, which her husband found on the front porch of their home on Sunday morning, May 13th. She found three other similar circulars in her mail box. Defendants objected to the testimony and moved to strike upon the ground that they were not responsible for the distribution of the circular, unless connected with the defendants. Motion overruled by the court, who then announced "same ruling." An exception was clearly implied from the nature of the objection, which was similar to the objection and reason therefor urged against the testimony of Mr. Fraser, the witness, who immediately preceded Mrs. Fraser, and which covered the same subject matter.

III.

At the close of the plaintiff's cause, Mr. Bell, attorney for defendants, then moved for directed verdict as to each and all of the defendants, to which refusal of court Mr. Bell took an exception, which exception was allowed and duly noted in the record.

IV.

The court erred in not granting the said motion to dismiss made at the close of the plaintiff's

case, for the reason that the indictment failed to state facts sufficient in either count thereof to constitute a cause of action against the defendants and failed to charge them with facts sufficient to show the commission of any offense against the United States.

V.

The court erred in failing to grant defendants' motion for a directed verdict of "not guilty" in favor of each of the defendants in the above cause, for the reason that the Government's evidence in the entire presentation of the plaintiff's case, as shown by the Bill of Exceptions, did not show the commission of any offense against the laws of the United States.

a. The court erred in failing to grant defendants' motion for directed verdict for the specific reason that there was no evidence tending to show as a matter of law that it was the object and purpose of the defendants to enter into a conspiracy to oppose by force or to prevent, hinder or delay the execution of any law of the United States.

b. There was no evidence in the case from which the court could say that a purpose existed on the part of the conspirators to oppose by force or by force to prevent, hinder or delay the execution of any then existing law of the United States.

c. The court erred in holding that a resolution of Congress, declaring war between the United

States and the Imperial German Government and devoting the resources of the country to the prosecution of said war, was so comprehensive in its scope as to include within its terms previously existing laws governing the military organization of the United States so as to constitute such a law or set of laws as could be opposed, hindered or delayed by the conduct of the defendants as shown in the record in their effort to prevent the adoption of a conscription or selective draft act, which had not then been passed.

d. The court erred in holding that the circular published by the defendants, together with their explanation of its purpose and object constituted as a whole such a sufficient state of facts as to show a purpose to enter into a conspiracy to defeat by force the then existing laws of the United States, to-wit: The act of June 3rd, 1917, making provision for national defense and other acts relating thereto.

e. The court erred in holding that the resolution of Congress on April 6, 1917, declaring war between the United States and the Imperial German Government was an existing law which could be opposed by force and which came under the purview of Sec. 6 of the Penal Code.

VI.

The court erred in the rejection of evidence offered by the defendants upon said trial in the

following instances, to-wit:

a. Defendant Wells, among other things, stated that he was a member of the American Union Against Militarism, which society had many things in common with the Socialist party. That it maintained headquarters in New York and Washington and disseminated literature against militarism. After war was declared this society ceased opposition to the war itself, but maintained its organization because it was thought that occasions might arise which would require the liberty of the people to be safeguarded. It was thought that conscription would quite likely become one of the measures and that the society and its members should endeavor to prevent the enactment of such a law. At this point, Mr. Bell, for defendants, asked this question: "What steps were taken by the local branch, by yourself and other members, with reference to opposing the conscriptive act?" Mr. Reames for the prosecution objected, upon the ground that the inquiry was immaterial. Mr. Bell then referred specifically to the act of May 18, 1917; Mr. Reames then objected on the ground that such inquiry was immaterial. The court sustained the objection. Mr. Bell then stated to the court as follows: "It would tend to show that the matter of good faith on the part of said defendants, what they did, what they said in reference to this conscription act, what they did and why they took

part in the circulation of the circular about which so much has been said in the case in chief." The court sustained the objection. Mr. Bell noted an exception.

b. Defendant testified that he wrote various men in Congress and received replies from them and among them one from Mr. Dill, stating that he, Mr. Dill, Congressman, was in agreement with his views. Defendants offered to introduce said letters. Mr. Reames, for the Government, objected to their introduction. The court sustained the objection. An exception was then taken by Mr. Bell.

c. Anna Louisa Strong was called by the defense and testified that she had been connected with the American Union Against Militarism. Had attended a number of its meetings held by the Seattle Branch before war was declared. She was asked as to the purpose of local branch and the general organization. Mr. Reames objected on the ground that the question was immaterial. The court sustained the objection and Mr. Bell preserved an exception to the court's ruling. Mr. Bell stated it was preliminary for the purpose of leading up to other questions.

d. MR. GREENE, a Government witness, was called in rebuttal and testified that a statement by defendant, Joe Pass, (made during his examination as a defense witness to the effect that certain statements made by him in New York had been

left out of the statement by the Witness Greene on direct examination), was not true, to-wit: That nothing had been left out of the statement which Mr. Greene testified as having been made by Joe Pass in New York. Mr. Bell then cross-examined to ascertain whether the transcript of Joe Pass' testimony in New York, which Mr. Greene had used to refresh his recollection during his examination in chief, contained any statement to the effect that Pass was interrogated specifically as to the Epler Block meeting, at which the distribution of the circulars occurred. Mr. Greene, upon looking at the transcript, could not find that the Epler Block meeting had been referred to specifically. Mr. Bell then asked the following questions, to which the witness made answer, viz:

"Q. In your presence a number of questions were asked Morris Pass in reference to the meeting in the Socialist Hall where the circulars referred to were distributed, that is a fact, isn't it?

A. Where the circulars were distributed, yes, sir.

Q. You did identify that meeting by the meeting where the circulars were distributed, didn't you?

A. Yes sir.

Q. He was asked a number of questions with reference to that meeting?

A. Yes sir.

Q. Why wasn't Joe Pass? Where are they?

A. I don't know, Mr. Bell; I didn't do the questioning.

Q. Don't you know why he was not interrogated on that subject?

A. He was questioned about the circulation, Mr. Bell.

Q. Yes, but not a question with reference to his attendance or non-attendance at that meeting is shown in that transcript, that is a fact, isn't it?

A. If I may look over it (counsel hands transcript to witness).

THE COURT: Anything further?

MR. BELL: Yes, I am waiting for the witness to answer the question.

Q. There is nothing shown there?

A. I can't find any.

Q. If Joe Pass was asked whether or not he attended that meeting, it does not show in your notes?

A. No sir, I can't find it in here.

A. And will you tell this jury why it was when these boys, when these defendants, Joe Pass and Morris Pass were being cross-examined by those detectives, Joe Pass was not asked whether he attended the meeting in the Socialist Hall?

A. I don't know, sir.

Q. Isn't that what they were trying to find out?

A. I don't know. I was merely the stenographer at that meeting and not the questioner."

At this point Mr. Reames, for the Government, offered the transcript of the testimony containing the questions propounded to the defendant, Joe Pass, in the office of the United States Secret Service, together with his answers.

Mr. Bell objected on the ground that the witness should testify from his recollection and from that only, stating that he could have recourse to notes made at the time for one purpose only, viz: that of refreshing his memory, and that the witness could not make his own notes and then introduce them.

The question asked of the witness by Mr. Bell was whether his notes indicated any question propounded to defendant, Joe Pass, upon the very matter which he was brought from New York for examination. The witness stated that they did not.

Mr. Bell then said his purpose was to show that this particular question was not asked of Joe Pass or that if said questions were asked they were eliminated from the transcript.

Thereupon the court overruled Mr. Bell's objection and admitted in evidence the entire transcript of the testimony of Joe Pass in his examination in New York City, which purported to contain all questions propounded to and answers made by him in the office of the Secret Service of the

United States in New York City as plaintiff's Exhibit II.

Thereupon Mr. Bell, for the defense, took an exception, which exception was allowed.

Plaintiff's Exhibit II was admitted over defendant's objection and is set forth in the Bill of Exceptions in said case. Mr. Bell then offered to cross-examine plaintiff's rebuttal witness, Mr. Greene, to explain or throw light upon apparent discrepancies between Joe Pass' testimony on the witness stand and his statement to the witness Greene in New York City, which was contained in the transcript admitted in evidence. Mr. Bell then offered to show by the witness that Joe Pass was interrogated in New York in regard to the first meeting held in reference to the circular, but that the transcript fails to show that he was interrogated with reference to the second meeting when the circulars were brought out and distributed. The court refused to allow Mr. Bell to cross-examine his witness concerning this transcript, to-wit: Plaintiff's Exhibit II, on the ground that the transcript would speak for itself. Mr. Bell then took an exception to the court's ruling and the rejection of Mr. Bell's offer.

VII.

Thereupon Mr. Bell, for the defendants, moved for directed verdict of not guilty in said cause in favor of all of the defendants. In reply the court remarked, "Let the record show a motion for di-

rected verdict for all the defendants is denied and exception allowed."

VIII.

The court erred in not granting the motion for directed verdict in favor of all the defendants for the reason that the entire evidence in the case showed no purpose or plan and no conspiracy on the part of the defendants to oppose any existing law of the United States.

a. The court erred in not dismissing the said cause and discharging the jury for the reason that the indictment and each count thereof, fails to state facts sufficient to constitute a cause of action against defendants or any of them and fails to show the commission of any offense against any existing law of the United States.

b. The court erred in holding that the resolution of Congress of April 6, 1917, declaring war between the United States and the Imperial German Government, was so related to any previously existing law of the United States as could be violated and opposed by force in its execution by any acts of the defendants, as shown and disclosed in the entire testimony.

c. The court should have held as a matter of law that the testimony as a whole disclosed no evidence of any conspiracy to oppose, prevent, hinder, or delay any existing law of the United States. That the testimony os a whole showed a purpose to oppose the adoption of a law which had not been

passed. There was no evidence of any purpose or plan to hinder, delay or defraud the execution of existing laws, or any law after its passage, and no evidence of a felonious or criminal purpose in the entire case.

d. The court erred in not directing the jury to return a verdict of not guilty as against each of the defendants for the reason that the evidence and the whole thereof, was clearly insufficient to sustain the allegations of the indictment.

IX.

The court erred in refusing to give the defendants' requested and proposed instructions in cause No. 3671, as and for the requested and proposed instructions in this cause, to-wit: No. 3797, in the District Court, Western District, Northern Division. Said proposed instructions being those certain instructions which the defendant, Wells, offered in the trial of No. 3671, which cause is referred to in the Bill of Exceptions by an explanatory note written into said bill; which said proposed instructions in cause No. 3671, insofar as applicable to the present case, were considered by the court and as offered, refused, denied and exceptions preserved and noted by the defendants' counsel. Said proposed instructions in said cause No. 3671, upon which plaintiffs in error now assign error, were as follows, to-wit:

First: The court erred in refusing the first of said instructions, which were as follows:

"I instruct you to find for the defendant, Hulet M. Wells, not guilty."

Second: The court erred in refusing to give the second requested instruction, making the necessary change therein, to read as follows:

"I instruct you to find the defendant, Morris Pass, not guilty."

Third: The court erred in refusing to give the third requested instruction, making the necessary changes, as follows:

"I instruct you to find the defendant, Sam Sadler, not guilty."

Fourth: The court erred in refusing to give the fourth requested instruction, making the necessary changes, as follows:

"I instruct you to find the defendant, Joe Pass, not guilty."

The court erred in refusing to give the fifth requested instruction, to-wit:

"I instruct you to find the defendants not guilty under Count One of this indictment."

The court erred in refusing to give the sixth requested instruction, eliminating count three in the language and substituting count two, so as to read as follows, to-wit:

"I instruct you to find the defendants not guilty under Count II of this indictment."

Seventh: The court erred in refusing to give the eighth instruction requested, to-wit:

"The first element of the crime of conspiracy, namely, the conspiring together, confederating together or agreement together is one of the essentials of the crime. By this is meant an intelligent, mutual agreement or understanding to co-operate for the purpose of carrying out some preconceived plan. There must be a preconceived plan. There must be some agreement to co-operate, there must be some meeting of the minds of the conspirators. Each of the conspirators must know that the other conspirator is going to do something to accomplish the end of the conspiracy. Mere knowledge that another or others are about to commit or about to attempt a crime, will not make one a conspirator. The mere haphazard doing of acts by persons acting independently does not constitute a conspiracy even though the acts done may tend to one end and even though each person may know of the other's acts."

Eighth: The court erred in refusing to give the eleventh requested instruction, to-wit:

"I instruct you that Article I of the Amendments to the Constitution of the United States provides that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.' That one of the inalienable rights of every Aemrcian citizen which even the

Congress of the United States is powerless to abridge is the right to peaceably assemble and petition Congress or individual representatives in Congress upon any matter of legislation whether the same be still pending and under consideration by that body, or whether the same shall have been finally passed and enacted into law, and whether the purpose of the petition be to defeat the passage of such act or to secure its amendment or repeal, and under no circumstances can the exercise of this right in good faith be considered criminal or even unlawful. It is likewise the inalienable right and privilege of all persons whether they act singly or collectively, to speak and write freely upon all questions of public importance and in so doing they are fully protected by the provisions of the Constitution I have just quoted, so far as you are concerned with the question in this case, so long as they do not advocate, advise or encourage the use of force in hindering, opposing or delaying the exercise of some existing law of the United States, or do not advocate, advise or encourage forcible opposition to the authority of the United States under such existing law.

It is extremely important that throughout all your deliberations in this case you should bear this point clearly in your minds. It is the policy of our law to permit at all times and in all places and under all circumstances the free discussion of all

public questions providing only that such discussion does not partake of the nature of advice or encouragement to resist existing law or existing authority, and neither the pendency of war nor any consideration of public necessity or patriotic duty can in any manner curtail or abridge this right of free discussion and free assemblage."

Ninth: The court erred in refusing to give the twelfth requested instruction, which is as follows, to-wit:

"I instruct you that the introduction on the 23rd day of May, 1917, before the Central Labor Council of the City of Seattle of the resolution which is set out in the indictment in this case was an ordinary exercise of the right of free speech and peaceable assemblage guaranteed to every person by the Constitution of the United States, and that you will not consider the same as in any sense unlawful or treat it as an overt act committed in pursuance of any unlawful conspiracy."

Tenth: The court erred in refusing to give the fifteenth requested instruction, which, eliminating the words "Count III" and substituting therefor the words "both counts," is as follows, to-wit:

"I instruct you that prior to the 18th day of May, 1917, neither the President of the United States nor any other person or body had any authority to call into the service of the United States or to organize the unorganized militia of the United

States. The authority to organize and call such militia into service is vested by the Constitution of the United States solely in Congress and until the 18th day of May, 1917, Congress had not exercised such authority. Prior to that date the only military forces which the President or any other officer of the United States had authority to call into service or to organize or direct in any manner were the regular naval forces, the regular army and the National Guard, and unless you believe from the evidence in this case beyond a reasonable doubt that it was the purpose of the defendants or of some one of the defendants acting in collusion and conspiracy with some other persons unknown, to forcibly oppose the authority of the Government in organizing and directing the regular naval forces, the regular army or the National Guard, you will find all the defendants not guilty under both counts of the indictment."

Eleventh: The court erred in refusing to give the sixteenth requested instruction, which, eliminating the words "Count II" and "page 15," and substituting for the words "Count III" "both counts," is as follows, to-wit:

"You will observe that in both counts of the indictment, it is charged that the defendants conspired by force to oppose the authority of the United States and of the President of the United States in carrying into effect the provisions of the

laws then existing, relating to the armed military and naval forces, and such other laws as might thereafter be enacted in pursuance of the joint resolution of Congress declaring war. In this connection I wish to caution you that you can not consider whether it was the purpose of the defendants or any of them, to prevent, hinder and delay the execution of any law that had not yet been enacted, or to oppose the authority of the Government or of the President under any law not yet enacted for the reason that I have already explained, that a man can not be guilty of a conspiracy to violate or obstruct or oppose laws which have not yet been enacted, nor can he be guilty of conspiring to oppose authority which has not yet been conferred; and so in determining the question of the defendants' guilt or innocence you must ignore entirely any statute, whether pending in Congress or not, which had not been finally enacted into law at the time the conspiracy is charged to have existed."

Twelfth: The court erred in refusing to give the nineteenth requested instruction, which is as follows, to-wit:

"Every person accused of crime is presumed in law to be innocent of the crime charged until his guilt is proven by competent evidence to the satisfaction of the jury and beyond all reasonable doubt. This presumption is not a mere fiction which a jury may lightly disregard, but is a substantial right

accorded by law to protect the innocent from unjust and unfounded accusations. It accompanies the defendant throughout the trial of the entire case. It follows therefore that you have no right to draw any inference of guilt from the fact that the grand jury has returned an indictment against these defendants, nor will you form your opinions of guilt or innocence as the evidence is being introduced during the trial, or until all of the evidence has been presented on both sides, and until you have been instructed by the court upon the law of the case, and you have finally retired to your jury room to deliberate upon your verdict."

Thirteenth: The court erred in refusing to give the twentieth requested instruction, which is as follows, to-wit:

"As I have already instructed you, the defendants in this case are presumed to be innocent until the contrary has been shown to your satisfaction beyond a reasonable doubt. It is not incumbent upon the defendants to prove their innocence. The burden rests upon the Government to prove their guilt. This burden never shifts to the defendant, and unless the Government has satisfactorily met this requirement as to each defendant, the jury will acquit such defendant."

Fourteenth: The court erred in refusing to give the twenty-first requested instruction, which is as follows, to-wit:

"I instruct you that in a criminal action you can not base conviction upon mere probabilities, but before you can find any defendant guilty you must be satisfied of guilt beyond all reasonable doubt."

Fifteenth: The court erred in refusing to give the twenty-third requested instruction, which is as follows, to-wit:

"Evidence is either direct and positive, or presumptive and circumstantial. When a witness testifies directly to the facts constituting the crime the evidence is said to be direct and positive. When he testifies to facts and circumstances having only an indirect relation to the facts constituting the crime, the evidence is presumptive and circumstantial. The commission of a crime may be proven either by the direct testimony of eye witnesses, or by circumstantial evidence; but when circumstantial evidence is relied on for a conviction, the circumstances should be consistent with each other. They must all be consistent with the defendants' guilt; and they must be inconsistent with any reasonable theory of the defendants' innocence. Evidence purely circumstantial in character which does not exclude every reasonable and rational theory of the defendants' innocence can not, as a matter of law, be convincing beyond a reasonable doubt."

Sixteenth: The court erred in refusing to give the twenty-fifth requested instruction, which is as follows, to-wit:

"I instruct you that when you retire to consider your verdict in this case you must consider separately the question whether each defendant is guilty or innocent, and if you have a reasonable doubt about the guilt or innocence of any defendant, it will be your duty to find such defendant not guilty."

Seventeenth: The court erred in refusing to give the twenty-seventh requested instruction, which is as follows, to-wit:

"You will disregard entirely the fact that the defendants have made a motion for a directed verdict in their favor. In ruling upon this motion the court has not even considered whether the defendants, or any of them, were guilty or innocent. Again, I want to caution you that the court has no view upon this question and has not expressed any view in passing upon this motion. It is the court's province to pass upon, and instruct you regarding, the law of the case; and it is your province to decide the facts."

Eighteenth: The court erred in refusing to give the twenty-eighth requested instruction, which is as follows, to-wit:

"In arriving at your verdict, you should consider separately the question of the guilt or innocence of each of the defendants charged; and if you have a reasonable doubt as to the guilt of one of the defendants, it is your duty to return a ver-

"I instruct you that in a criminal action you can not base conviction upon mere probabilities, but before you can find any defendant guilty you must be satisfied of guilt beyond all reasonable doubt."

Fifteenth: The court erred in refusing to give the twenty-third requested instruction, which is as follows, to-wit:

"Evidence is either direct and positive, or presumptive and circumstantial. When a witness testifies directly to the facts constituting the crime the evidence is said to be direct and positive. When he testifies to facts and circumstances having only an indirect relation to the facts constituting the crime, the evidence is presumptive and circumstantial. The commission of a crime may be proven either by the direct testimony of eye witnesses, or by circumstantial evidence; but when circumstantial evidence is relied on for a conviction, the circumstances should be consistent with each other. They must all be consistent with the defendants' guilt; and they must be inconsistent with any reasonable theory of the defendants' innocence. Evidence purely circumstantial in character which does not exclude every reasonable and rational theory of the defendants' innocence can not, as a matter of law, be convincing beyond a reasonable doubt."

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Seventeenth: The court erred in refusing to give the twenty-seventh requested instruction, which is as follows, to-wit:

"You will disregard entirely the fact that the defendants have made a motion for a directed verdict in their favor. In ruling upon this motion the court has not even considered whether the defendants, or any of them, were guilty or innocent. Again, I want to caution you that the court has no view upon this question and has not expressed any view in passing upon this motion. It is the court's province to pass upon, and instruct you regarding, the law of the case; and it is your province to decide the facts."

Eighteenth: The court erred in refusing to give the twenty-eighth requested instruction, which is as follows, to-wit:

"In arriving at your verdict, you should consider separately the question of the guilt or innocence of each of the defendants charged; and if you have a reasonable doubt as to the guilt of one of the defendants, it is your duty to return a ver-

dict of not guilty as to such defendant."

All of which foregoing instructions were applicable to the present case against plaintiffs in error, which were considered by the court as offered, refused, denied and exceptions in favor of plaintiffs in error preserved and noted; and the court erred in not giving the said proposed and requested instructions in this said cause.

X.

The court erred in charging the jury that the indictment stated an offense against the United States, although charging the same by using two separate counts in the indictment.

XI.

The court erred in instructing the jury as follows:

"At this time the law provided for distinct military and naval forces: First, the regular standing army and the military forces, and, Second, the male citizens of the United States between eighteen and forty-five years of age, classified into the National Guard and Naval Militia and Unorganized Militia, and further provided for the drafting of a sufficient number of the unorganized militia into the service of the United States where there were not enough voluntary enlistments to keep the reserve battalions at the prescribed strength,"—for the reason that notwithstanding the President had the power to call the regular militia into service, the law at that

time did not permit a person to be drafted into the military service of the country against his wishes and against his volition in the premises. So that as applied to the case at bar and the conduct of the defendants as disclosed in the Bill of Exceptions the instruction was misleading, confusing and erroneous. The refusal of the court to give defendants' requested instructions, Nos. 11, 12, 15 and 16, which would have instructed the jury upon the true condition of the law at that time and the obligation that a male citizen of the United States owed to the Government in military matters, together with the instruction actually given by the court, clearly shows how misleading and erroneous the instruction was.

XII.

The court erred in instructing the jury as follows:

"This conspiracy, if any was formed, can not be brought forward and made to offend against the Conscription Act of May 18, 1917. The issue is whether the defendants did conspire to oppose by force and to prevent, hinder and delay the President of the United States in carrying out this resolution of Congress under the law as it existed at the time charged in this indictment and prior to the 18th day of May, 1917; and in considering this you will take into consideration all of the evidence which has been offered and admitted and if you are convinced beyond a reasonable doubt that the object

and purpose of defendants was by force to prevent, hinder and delay the President in employing the entire Navy and Military forces of the United States in the prosecution of the war against the Imperial German Government as charged, then the defendants who participated in such conspiracy would be guilty and in this connection you will have in mind the power and authority to secure enlistments from the unorganized militia and the power to draft into the service of the United States from the unorganized militia a sufficient part to maintain the battalions at the proper strength,"—for the reason that the evidence as a whole showed a purpose in the use of the circular (Plaintiff's Exhibit VI) to resist involuntary conscription or draft. The United States at that time did not have the power to compel any male citizen of the United States to serve in the United States Army. The evidence discloses no such purpose and the instruction misstates the law and does not apply to the facts disclosed in the case at bar for this reason,—it was erroneous, misleading and prejudicial to the defendants, when considered with the refused instructions, Nos. 11, 12, 15 and 16.

XIII.

The court erred in charging the jury, to-wit:

"If you believe or if you have any reasonable doubt as to whether the 'No-Conscription' circular, set out in the indictment and admitted in evidence,

did not purpose to oppose by force or incite others to oppose by force and hinder and delay the President in the execution of the joint resolution of Congress, then, of course, you will not consider it in that connection. But if you believe beyond a reasonable doubt that the purpose and effect of the circular was to incite others by force to oppose, hinder and delay the execution of such resolution, then such defendants who entered into such conspiracy would be guilty. In this connection I think I should say that the defendants are presumed to know the law and can not shield themselves behind ignorance of the law. The law requires that all persons know what the law is; you are also instructed that every person is presumed to intend the natural consequences or results of his acts deliberately or knowingly done."

This instruction was excepted to specifically at the close of the case in the presence of the jury for the reason that there the acts committed were not in themselves felonious, so as to involve a felonious purpose or intent as a matter of law in the commission of the act. The instruction is erroneous and prejudicial. The publication of a circular intending to incite persons to resist a conscription act, which had not been passed, could not in any sense be construed as so inherently felonious as to commit the defendants to a felonious purpose per se in the publication of the circular nor in the criminal

law is every person as a matter of law presumed to know the law to such a degree as to impose upon him a felonious purpose when, in fact, he might have been ignorant of the law and had no such purpose. The instruction in the language given was highly prejudicial in view of the facts disclosed in the record. Exceptions were duly taken to the said portion of the court's instructions.

XIV.

The court erred in instructing the jury, to-wit:

"Force need not be actual physical force manifested by the defendants, but must be such conduct, either acts, statements, invitations or solicitations, the evident purpose of which is to incite others to the use of forcible resistance in hindering or delaying the Government of the United States in the execution of its laws. It is not essential that the object of the conspiracy should actually have been used. Nor is it essential that the conspirators should have agreed upon the precise method of employing force or the weapons or instruments of such force. If a conspiracy was formed and the use of force was the natural or necessary means of accomplishing the object of the conspiracy, and if its use was necessarily incident to the carrying out of the plan of the conspiracy, whether that force should be used by the defendants or only by those persons who should be induced to co-operate with them, then the defendants would be guilty of the

offense charged. Nor can the effect of the circular be neutralized or limited by any motive or purpose or intent not communicated with the circular. Nor could what Webster or anyone else said enter into this issue or limit the effect of the circular, if the natural and reasonable conclusion to be deduced from the circular in evidence and what was done with it was to incite by force opposition to the law of the United States as charged,''—for the reason that the indictment charged that the purpose and object of the conspiracy was to conspire by force to hinder, delay or prevent the execution of existing laws of the United States. The element of force must have been the chief ingredient of the conspiracy; they must have planned to use force to prevent the execution of a law, and contemplated the use of actual physical force by the conspirators, which should relate to a then existing law, and a statement that ''nor can the effect of the circular be neutralized or limited by any motive or purpose or intent not communicated with the circular,'' eliminates from the jurors' minds all of the other testimony, explaining the use of the circular, the purpose the defnedants had in mind, the purpose of the meeting and the purpose they sought to accomplish. The instruction as given was therefore involved, erroneous, and highly prejudicial. Exceptions were taken in the presence of the jury to this portion of the charge.

XV.

The defendants excepted to the instruction relating to the freedom of speech, viz:

"In this connection * * * the defendants had the right of freedom of speech and lawful assemblage and to petition Congress or to do anything to alleviate any grievances, so long as they did not advocate or advise or encourage the use of force in opposing, hindering or delaying the execution of the law of the United States as charged in the indictment. The defendant, Wells, had a right to address Dr. Strong's church, as testified to by one of the witnesses. He had a right to do or say anything in advocating the repeal of the law or its advocating the repeal of the law or its amendment, to write to Congressmen and to induce others to write to Congressmen, so long as he acted within the provisions of the law. But in this indictment he is charged with acting without the provisions of the law, and that is the issue which is now before you. All citizens are free to express their views on all public questions so long as they are actuated by honest purposes and not for the purpose of transgressing the rights of others, the laws of the state, or obstructing by force the execution of the laws of the United States; but no person has a right to convert the liberty of speech into a license or to carry it to a point where it interferes with the due execution of the law, where his opposition is not honest,

and where he is not actuated by an intention of expressing his views, but is manifested by an intent to violate the rights of others or the laws of the United States. A person may say or do anything not in itself unlawful to prevent the passage of a law or to secure the repeal of one already passed, but after a law is passed it is every man's duty to conform his acts in accordance with the provisions of the law, and he may not for the purpose of creating sentiment against the wisdom of the law do anything with intent to procure the violation of the law by force in his advocacy of its unwisdom or for the purpose of repeal.

"The law with relation to the freedom of speech was recently commented upon by another Judge (Judge Wolverton), which I fully approve. In referring to the constitution, he says:

> " 'That instrument does declare the Congress shall make no law abridging the freedom of speech. The guarantee is a blessing to the people of this Government, and great latitude is preserved to them in the exercise of that right. But a citizen may not use his tongue or his pen in such a way as to inflict legal injury upon his neighbor or another. Nor has any person the right, under the guarantee of freedom of speech, to shape his language in such a way as to incite discord, riot, or rebellion, because such action leads to a breach of the peace,

and disturbs good order and quietude in the community. Nor is he privileged to utter such language and sentiment as will lead to an infraction of law, for the laws of the land are designated to be observed, and not to be disregarded and overridden. Much less has he the privilege, no matter upon what claim or pretense, so to express himself, with willful purpose, as to lead to the obstruction and resistance of the due execution of the laws of the country, or as will induce others to do so. A citizen is entitled to fairly criticise men and measures; that is men in public office, whether of high or low degree, and laws and ordinances intended for the government of the people; even the constitution of his state or of the United States; this with a view, by the use of lawful means, to improve the public service, or to amend the laws by which he is governed, or to which he is subjected. But when his criticism extends, or leads by willful intent, to the incitement of disorder and riot, or to the infraction of the laws of the land or to the constitution of this country, or with willful purpose, to resistance and obstruction of the due execution of the laws by the proper authorities, it overleaps the bounds of all reasonable liberty accorded to him by the guarantee of the freedom of speech, and this because the very means adopted is an

unlawful exercise of his privilege,' "
for the reason that in Judge Wolverton's speech there is a reference to any person who incites or shapes his language in such a way as to incite discord, riot, or rebellion, because such language leads to a breach of the peace, or leads by willful intent to the incitement of disorder and riots, or to the infraction of the laws of the land, for the reason that the language used in this instruction was highly prejudicial and erroneous. The mere fact that the language used in the circular might incite to riot and disorder or breach of the peace would not necessarily render the defendants guilty if it was not the purpose of the conspiracy which they had formed. This language unduly emphasizes the effect upon the public mind which might follow the reading of the circular when taken in conjunction with the previous instruction to the jury that the circular must speak for itself upon the question of intent and no other evidence should be taken into consideration to minimize or detract from the language of the circular itself. This instruction was error and was not corrected by the additional comment to the jury after counsel had noted an exception, which comment is found on page 89 of the Bill of Exceptions between lines five and thirteen.

XVI.

The instructions as a whole were erroneous and highly prejudicial in that the jury was not per-

mitted to take into consideration the honest purpose or intent which the defendants claimed to have in holding the meeting and publishing the circular. The instruction, as a whole, would lead the jury to believe that actual force need not have been contemplated by the conspirators and that any immoderate or vile language, tending to creat riot and disorder, if such was the natural effect of the circular, was sufficient to establish the guilt of the defendants without regard to the purpose of the publication or the object of holding the meeting or any of the facts and circumstances given by the defendants in explanation of their conduct. Exception thereto was noted. For these reasons the jury could not fairly and impartially consider the facts presented to them in determining the guilt of the defendants. The instructions were therefore erroneous and prejudicial.

XVII.

All and singular the court erred in the instructions which he gave when the same are considered with the instructions in cause No. 3671, hereinbefore set forth, which were requested, offered and denied, preserving exceptions to plaintiffs in error for the reason that the legal rights of the defendants were not clearly and adequately given to the jury. The instructions, as a whole, which were given failed to substantially and accurately instruct the jury upon the law of the case and said refusal to instruct, to-

gether with the instructions which were given constitute prejudicial error in said cause.

WILSON R. GAY,
WINTER S. MARTIN,
Attorneys for Defendants.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 28, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3797.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HULET M. WELLS, et al.,
Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, Hulet M. Wells, as principal, and Hiram E. Wells and Alfreda E. Wells, his wife, and Sydney Strong and C. W. Doyle and Maudie C. Doyle, as sureties, are held and firmly bound unto the United States of America, plaintiff in the above entitled action in the penal sum of $5000.00 lawful money of the United States for the payment of which well and truly to be made we bind ourselves, and each of our heirs, executors and ad-

ministrators, jointly and severally firmly by these presents:

THE CONDITION of this obligation is such that

WHEREAS, The above named defendant, Hulet M. Wells was on the 8th day of March, 1918, sentenced in the above entitled case as follows: To serve a term of two years in the Federal penitentiary at McNeils Island in the State of Washington, and

WHEREAS, The said defendant has appealed from said sentence and judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit, and

WHEREAS, The above entitled court has fixed the defendant's bond to stay execution of said judgment in the sum of $5000.00,

NOW, THEREFORE, If the said defendant, Hulet M. Wells, shall diligently prosecute his said appeal and shall obey and abide by and render himself ameanable to all orders which said appellate court shall make, or order to be made, in the premises, and shall render himself ameanable and obey all process issued or ordered to be issued by said Appellate Court herein; and shall perform any judgment made or entered herein by said Appellate Court, and shall not leave the jurisdiction of this court without leave being first had and shall obey and abide by and render himself ameanable to any

and all orders made or rendered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself and ameanable, and obey all and any orders issued by said District Court surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals, or the said District Court, then this obligation to be void, otherwise to remain in full force and effect.

SEALED with our seals and dated this 18th day of March, 1918.

HULET M. WELLS, (Seal)
Principal.

HIRAM E. WELLS, (Seal)

ALFREDA L. WELLS, (Seal)
Sureties.

SYDNEY STRONG, (Seal)
Surety.

C. W. DOYLE, (Seal)
Surety.

MAUDIE A. DOYLE, (Seal)
Surety.

State of Washington,
County of King.—ss.

C. W. Doyle and Maudie C. Doyle, Hiram E. Wells and Alfreda L. Wells and Sydney Strong being first duly sworn on oath deposes and says, each for himself: That he is a resident of the State of Washington, and is worth the full sum of $5000. in property situated within said State over and above all just debts and liabilities and not exempt

from execution, and that he is not an attorney at law or other officer of the above entitled court.

C. W. DOYLE. (Seal)
MAUDIE C. DOYLE. (Seal)
HIRAM E. WELLS. (Seal)
ALFREDA L. WELLS. (Seal)
SYDNEY STRONG. (Seal)

Subscribed and sworn to before me this 18th day of March, A. D. 1918.

DONALD A. McDONALD,
Notary Public in and for the State of Washington, residing at Seattle.

O. K.—This March 19, 1918.

BEN L. MOORE,
Assistant U. S. Attorney.

The foregoing bond is hereby approved this 19th day of March, 1918, and the Marshal of this court is hereby ordered to release the defendant, Hulet M. Wells from custody pending the termination of his appeal and fulfillment of the conditions of the foregoing bond.

JEREMIAH NETERER,
Judge.

Endorsed: Bond. Filed in the United States District Court, Western District of Washington, Northern Division, March 19, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, et al.,

Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, Sam Sadler as principal, and Emma S. Parks, Rebecca Snellenberg and Clarence E. Kingery as sureties, are held and firmly bound unto the United States of America, plaintiff, in the above entitled action, in the penal sum of $5000.00 lawful money of the United States for the payment of which well and truly to be made we bind ourselves, and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

THE CONDITION of this obligation is such that

WHEREAS, The above named defendant, Sam Sadler, was on the 18th day of March, 1918, sentenced in the above entitled cause as follows: To serve two years in the U. S. Penitentiary at McNeils Island, said sentence being upon a verdict of guilty of violation of Sec. 6, U. S. Penal Code, and

WHEREAS, The said defendant has appealed from said sentence and judgment to the Circuit

Court of Appeals of the United States for the Ninth Circuit, and

WHEREAS, The above entitled court has fixed the defendant's bond to stay execution of said judgment in the sum of $5000.00.

NOW, THEREFORE, The said defendant, Sam Sadler, shall diligently prosecute his said appeal and shall obey and abide by and render himself amenable to all orders which said appellate court shall make, or order to be made, in the premises, and shall render himself amenable and obey all process issued or ordered to be issued by said Appellate Court herein; and shall perform any judgment made or entered herein by said Appellate Court, and shall not leave the jurisdiction of this court without leave being first had and shall obey and abide by and render himself amenable to any and all orders made or rendered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable, and obey all and any orders issued by said District Court and shall pursuant to any order issued by said District Court surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals, or the said District Court then this obligation to be void, otherwise to remain in full force and effect.

SEALED with our seals and dated this 22nd

day of March, 1918.

SAM SADLER, (Seal)
Principal.

EMMA S. PARKS, (Seal)

MRS. REBECCA SNELLENBERG, (Seal)
Sureties.

CLARENCE E. KINGERY, (Seal)
Surety.

State of Washington,
County of King.—ss.

Emma S. Parks and Mrs. Rebecca Snellenberg, and Clarence E. Kingery being first duly sworn on oath depose and say, each for himself, that he is a resident of the State of Washington, and is worth the full sum of $5000.00 in property situated within said State over and above all just debts and liabilities and not exempt from execution, and that he is not an attorney at law or other officer of the above entitled court.

EMMA S. PARKS. (Seal)

MRS. REBECCA SNELLENBERG. (Seal)

CLARENCE E. KINGERY. (Seal)

Subscribed and sworn to before me this 23rd day of March, 1918.

SAMUEL E. LEITCH,
Deputy Clerk U. S. District Court,
Western District of Washington.

The foregoing bond together with deposits of $1775.00 each is hereby approved this 25th day of March, 1918, and the Marshal of this court is hereby

ordered to release the defendant Sam Sadler from custody pending the termination of his appeal and fulfillment of the conditions of the foregoing bond.

JEREMIAH NETERER,

Judge.

O. K.—In conjunction with deposit of Seventeen Hundred and Seventy-five Dollars cash, ($1775.00) with Clerk of the Court. This March 23rd, 1918.

BEN L. MOORE,

Assistant U. S. Attorney.

United States District Court, Western District of Washington, Northern Division.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, et al.,

Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, Morris Pass as principal, and Ernest A. Fabi and Jennie Fabi and S. H. Weber and Leander A. Vaughan, a widower, as sureties, are held and firmly bound unto the United States of America, plaintiff in the above entitled action, in the penal sum of $5000.00, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, and each of our heirs, executors and administrators, jointly and

severally firmly by these presents;

The conditions of this obligation is such that

Whereas the above named defendant, Morris Pass, was on the 18th day of March, 1918, sentenced in the above entitled case as follows, to-wit: To serve two years in the Federal Penitentiary at McNeils Island, sentence being upon a verdict of guilty of violation of Section 6, Penal Code, and

Whereas the said defendant has appealed from said sentence and judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit, and

Whereas the above entitled Court has fixed the defendant's bond to stay execution of said judgment in the sum of $5000.00;

Now therefore, the said defendant Morris Pass shall diligently prosecute his said appeal and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or other to be made, in the premises, and shall render himself amenable and obey all process issued or ordered to be issued by said Appellate Court herein; and shall perform any judgment made or entered herein by said Appellate Court, and shall not leave the jurisdiction of this Court without leave being first had and shall obey and abide by and render himself amenable to any and all orders made or rendered by the District Court of the United States for the Western District of Washington, Northern

Division, and will render himself amenable, and obey all and any orders issued by said District Court and shall pursuant to any order issued by said District Court surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals, or the said District Court, then this obligation to be void, otherwise to remain in full force and effect.

Sealed with our seals and dated this........day of March, 1918.

MORRIS PASS, (Seal)
Principal.
ERNEST A. FABI, (Seal)
JENNY FABI, (Seal)
S. H. WEBER, (Seal)
L. A. VAUGHAN, (Seal)
Sureties.

State of Washington,
County of King.—ss.

Ernest A. Fabi and Elizabeth Fabi and L. A. Vaughn and S. H. Weber, being first duly sworn on oath deposes and says, each for himself; that he is a resident of the State of Washington, and is worth the full sum of $5000.00 in property situated within said State over and above all just debts and liabilities and not exempt from execution, and that he is not an attorney at law or other officer of the above entitled Court.

ERNEST A. FABI.
JENNIE FABI.

S. H. WEBER.

L. A. VAUGHAN.

Subscribed and sworn to before me this 20th day of March, 1918.

(Seal) ED M. LAKIN,

Deputy Clerk U. S. District Court,

Western District of Washington.

The foregoing bond is hereby approved on condition that $2500.00 deposited in cause U. S. vs. Pass be also held in this case as additional security, this 20th day of March, 1918, and the Marshal of this Court is hereby ordered to release the defendant, Morris Pass, from custody pending the termination of his appeal and fulfillment of the conditions of the foregoing bond.

JEREMIAH NETERER,

Judge.

Approved in conjunction with cash deposit of $2500.00 already deposited in other case and to be held in this as well, this 20th day of December, 1917.

DONALD A. McDONALD,

Asst. U. S. Atty.

Indorsed: Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 20, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 3797.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HULET M. WELLS, et al.,
Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, Joe Pass, as principal, and Louis Stettler, a bachelor, and James Simpson and Elizabeth Simpson, as sureties, are held and firmly bound unto the United States of America, plaintiff in the above entitled action in the penal sum of $5000.00, lawful money of the United States for the payment of which well and truly to be made we bind ourselves, and each of our heirs, executors and administrators, jointly and severally firmly by these presents;

The condition of this obligation is such that

Whereas the above named defendant, Joe Pass, was on the 18th day of March, 1918, sentenced in the above entitled case as follows: To serve two years in the Federal Penitentiary at McNeil Island, said sentence being upon a verdict of guilty of violation of Sec. 6, U. S. Penal Code; and

Whereas the said defendant has appealed from said sentence and judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit; and

Whereas the above entitled Court has fixed the defendant's bond to stay execution of said judgment in the sum of $5000.00;

Now therefore, if the said Defendant Joe Pass shall diligently prosecute his said appeal and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made, in the premises, and shall render himself amenable and obey all process issued or ordered to be issued by said Appellate Court herein; and shall perform any judgment made or entered herein by said Appellate Court, and shall not leave the jurisdiction of this Court without leave being first had and shall obey and abide by and render himself amenable to any and all orders made or rendered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable, and obey all and any orders issued by said District Court, and shall pursuant to any order issued by said District Court surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals, or the said District Court, then this obligation to be void, otherwise to remain in full force and effect.

Sealed with our seals and dated this........day of March, 1918.

JOE PASS, (Seal)
Principal.

LOUIS STETTLER, (Seal)
JAMES SIMPSON, (Seal)
ELIZABETH SIMPSON, (Seal)
Sureties.

State of Washington,
County of King.—ss.

Louis Stettler, James Simpson and Elizabeth Simpson being first duly sworn on oath deposes and says, each for himself, that he is a resident of the State of Washington, and is worth the full sum of $5000.00 in property situated within said State over and above all just debts and liabilities and not exempt from execution, and that he is not an attorney at law or other officer of the above entitled court.

LOUIS STETTLER.
JAMES SIMPSON.
ELIZABETH SIMPSON.

Subscribed and sworn to before me this 19th day of March, A. D. 1918.

(Seal) ED M. LAKIN,
Deputy Clerk U. S. District Court,
Western District of Washington.

O. K.—This March 19, 1918.

BEN L. MOORE,
Assistant U. S. Atty.

The foregoing bond is hereby approved this 19th day of March, 1918, and the Marshal of this Court is hereby ordered to release the defendant, Joe Pass, from custody pending the termination of

his appeal and fulfillment of the conditions of the foregoing bond.

JEREMIAH NETERER,
Judge.

Indorsed: Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 19, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

AT LAW.

No. 3797.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOE PASS,
Defendants.

Order Allowing Writ of Error.

Now, on this 28th day of June, 1918, came the defendants and filed herein and presented to the Court their petition praying for the allowance of a Writ of Error intended to be urged by them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, upon consideration of said petition and being fully advised in the premises, the Court does hereby allow the said Writ of Error.

And it is hereby ordered that a supersedeas and bail bond for this appeal and writ having been filed, all proceedings in this cause toward the execution of said judgment are hereby stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals.

And it is further ordered that the defendants shall be released from custody pending the hearing and determination of said Writ of Error.

JEREMIAH NETERER,

Judge.

Service of the within Order by delivery of a copy to the undersigned is hereby acknowledged this 28th day of June, 1918.

BEN L. MOORE,

Assistant Attorney for the United States.

Indorsed: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 28, 1918. Frank L. Crosby, Clerk. Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

AT LAW.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOE PASS,

Defendants.

Order Directing Transmission of Original Exhibits to Appellant Court.

Upon stipulation of the plaintiff and defendants in the above-entitled cause, it is hereby ordered that the clerk of this court transmit to the United States Circuit Court of Appeals for the Ninth Circuit, as part of the record herein, all the exhibits introduced in evidence at the trial hereof in lieu of printed copies thereof.

Done in open court this 28th day of June, 1918.

JEREMIAH NETERER,

Judge.

O. K.—This June 28, 1918.

BEN L. MOORE, Asst. U. S. Atty.

Indorsed: Order Directing Transmission of Original Exhibits to Appellant Court. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 28, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

AT LAW.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOE PASS,

Defendants.

Stipulation as to Record.

It is hereby stipulated that the following designated papers comprise all the papers, exhibits and other proceedings which are necessary to the hearing of this cause upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and that none but such papers need be included in the records of said court:

Indictment.

Arraignment and Plea, each defendant.

Empaneling of Jury.

Verdict.

Judgment and Sentence, each defendant.

Order of May 6, 1918, extending November Term, 1917, to settle Bill of Exceptions and extending time to settle same under the rules of District Court.

Order of June 3d extending time to June 17th to settle Bill of Exceptions and extending Novem-

ber Term, 1917, for said purposes.

Journal entry June 14th extending term and time from 17th of June to 24th, inclusive.

Bill of Exceptions.

Proposed Amendments to Bill of Exceptions.

Order Settling Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Supersedeas Bond, each defendant.

Order Allowing Writ of Error.

Order as to Exhibits.

Stipulation as to Record.

Writ of Error.

Citation.

That the original exhibits herein may be attached to the record by the clerk and transmitted to the Circuit Court of Appeals and same need not be printed.

BEN L. MOORE,
Assistant United States Attorney.
WILSON R. GAY,
WINTER S. MARTIN,
Attorneys for Defendants.

Indorsed: Stipulation as to Record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 1, 1918. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 3797.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, et al.,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington.—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this printed record, numbered from 1 to 223, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on return to said Writ of Error herein from the judgment of said United States District court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 484 folios at 15c	$72.60
Certificate of Clerk to transcript of record—4 folios at 15c	.60
Seal to said Certificate	.20
Certificate of Clerk to original Exhibits—3 folios at 15c	.45
Seal to said Certificate	.20
Statement of cost of printing said transcript of record, collected and paid	175.00
Total	$249.05

I hereby certify that the above cost for preparing and certifying record, amounting to $249.05, has been paid to me by Plaintiff in Error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 22nd day of July, 1918.

(Seal) F. M. HARSHBERGER,
Clerk.

The United States of America.

In the United States Circuit Court of Appeals for the Ninth Circuit.

AT LAW.

No. 3797.

HULET M. WELLS, SAM SADLER,
MORRIS PASS and JOE PASS,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error.

United States of America,
Ninth Judicial Court.—ss.

The President of the United States of America:

To the Honorable Judge of the District Court of the United States for the Western District of Washington:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between the United States of America, as plaintiff, and Hulet M. Wells, Sam Sadler, Morris Pass and Joe Pass, as defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein

given, that they under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 27th day of July, 1918, next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS: The Honorable EDWARD D. WHITE, Chief Justice of the United States of America, this 28th day of June, 1918.

(Seal) FRANK L. CROSBY,
Clerk of the United States District Court
for the Western District of Washington.

Allowed this 28th day of June, 1918, after plaintiffs in error had filed with the clerk of this court with their petition for a writ of error their assignment of errors.

JEREMIAH NETERER,
Judge of the District Court of the United States
for the Western District of Washington.

Service of the within Writ by delivery of a copy to the undersigned is hereby acknowledged this 28th day of June, 1918.

BEN L. MOORE,

Assistant Attorney for the United States.

Indorsed: Writ of Error. Filed in the U. S. District Court, Western District of Washington, Northern Division, June 28, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

The United States of America.

In the United States Circuit Court of Appeals for the Ninth Circuit.

AT LAW.

No. 3797.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOE PASS,

Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation on Writ of Error.

United States of America,
Ninth Judicial Court.—ss.

To the UNITED STATES OF AMERICA,

Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden

at the city of San Francisco, State of California, on the 27th day of July, 1918, next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Hulet M. Wells, Sam Sadler, Morris Pass and Joe Pass, are plaintiffs in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, this 28th day of June, 1918.

(Seal) JEREMIAH NETERER,
Judge.

Service of the foregoing citation and receipt of a copy thereof is hereby admitted this 28th day of June, 1918.

BEN L. MOORE,
Assistant United States Attorney.

Indorsed: Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 28, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3186

United States

Circuit Court of Appeals

For the Ninth Circuit

HULET M. WELLS, SAM SADLER,
MORRIS PASS and JOE PASS,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Bill of Exceptions

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

FILED
AUG 28 1918

Equity Printing Co., Seattle, Wash.

No. 3186

United States

Circuit Court of Appeals

For the Ninth Circuit

HULET M. WELLS, SAM SADLER,
MORRIS PASS and JOE PASS,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Bill of Exceptions

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division

Equity Printing Co., Seattle, Wash.

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UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 3797

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HULET M. WELLS, SAM SADLER, MORRIS PASS and JOSEPH PASS,

Defendants

Stipulation Re Bill of Exceptions

IT IS HEREBY STIPULATED by and between the parties hereto and their respective counsel that the typewritten Bill of Exceptions which contains all of the matters and things offered in Defendants' original Bill together with all of the amendments allowed thereto, all of which was heretofore filed, settled, allowed and certified, may be now settled, allowed and certified as the Bill of Exceptions in said cause in lieu of the separate Bill and the amendments thereto heretofore allowed and settled.

IT IS FURTHER STIPULATED that this said Bill of Exceptions in its entirety shall be settled as and of the date of June 19th and certified by the Court, and filed by the defendants as a part of the record in the above entitled cause, the same to be sent and forwarded to the Circuit Court of Appeals

in like manner as the original record, and to have the same force and effect as the Bill and the amendments which were allowed, settled and certified as separate documents in said cause.

WITNESS our hands this 16th day of Aug. 1918.

CLARENCE L. REAMES
BEN. L. MOORE
Attorneys for Plaintiff
WILSON R. GAY
& WINTER S. MARTIN
Attorneys for Defendants.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

No. 3797

UNITED STATES OF AMERICA,
Plaintiff,
vs.
HULET M. WELLS, SAM SADLER, MORRIS PASS and JOSEPH PASS,
Defendants.

Bill of Exceptions

BE IT REMEMBERED that on the trial of this cause in this Court at the November Term, A. D. 1917, the Honorable Jeremiah Neterer, presiding, when the following proceedings were had, to wit: A jury was impaneled and sworn according to law, and thereupon the United States, plaintiff, to sustain

the issue on its part offered testimony of the following witnesses and certain exhibits as its evidence in chief:

NELL R. SMITH, who was offered as plaintiff's first witness, testified that she was the secretary of the Trade Printery, 88 Jackson Street, Seattle; that she kept the books and records of that concern and identified the cash book containing certain entries in May 1917, relating to the printing of 20,000 circulars ordered for the "No Conscription League," Seattle Branch, as plaintiff's Exhibit I. This entry contained reference to two cash items of $10.00 each, one on May 7th and one on May 11th, for the payment of certain "No Conscription League" circulars. She also offered the Job Register of said concern as plaintiff's Exhibit II, containing the entry, "No Conscription League," Seattle Branch 20,000 circulars, $20.00, delivered on May 11th, invoiced May 16th. She also identified an envelope containing the manuscript copy of the circular, which this company printed at the request of defendant, Hulet M. Wells, which was identified as plaintiff's Exhibit III. She also identified the proof copy of this same circular as plaintiff's Exhibit IV. She next offered the invoice containing the entry, Seattle Branch No Conscription League, 20,000 circulars, $20.00, under date of May 11, 1917, as plaintiff's Exhibit V. Witness testified that she left this proof with the de-

fendant, Wells, at the City Light Department Building, and made these book entries referred to. They were offered in evidence by the Government as Exhibits I, II, III, IV and V, respectively, and same were admitted.

WILLIAM R. SAUNDERS was next offered as a witness and testified that he was President and Manager of the Trade Printery in May 1917, who also identified the Exhibits referred to. No objection was offered to these exhibits.

GEORGE P. LISTMAN was next offered by the Government. He testified that he was superintendent of the Mechanical Department of the Trade Printery in May 1917, and was familiar with the particular job of printing ordered by the "No Conscription League," covered and identified by the several exhibits referred to. He testified that defendant, Wells, left this printing job with the Trade Printery, and paid him $10.00 on account, paying the balance on delivery. Witness sent the proof to Wells at the City Light Department. It was returned by Wells corrected and ok'd. The proof bore the particular notation, "O. K. with corrections, H. W." With also the words and figures, "P. O. Box 225." "Corrected proof. Would like circulars for Friday evening, Wells." Witness testified that the Union Label number, which serves to identify the shop turning out the work, was left off at the suggestion of Mr. Wells.

Witness testified that leaving out the shop number on the union label would make it a little difficult to find where the circular was printed. Defendants admitted at this point that Wells wrote the notations and corrections on plaintiff's Exhibit IV, O. K.'ing and approving the proof.

The Government next called J. E. FRIERMOOD, who testified that he was present on May 11th at a meeting held in the Epler Building in the City of Seattle. He testified that this room had a board partition which divided it partially into two rooms. He went to this room shortly before eight o'clock in the evening. That there were possibly thirty people present. He saw the defendants, Wells and Sadler, at this meeting. And Wells and Sadler were present during the discussion of the No-Conscription circular which took place at said meeting and which witness then heard. Almost all the talk was along the line that there was about to be passed a law of universal conscription and that before the law was signed was the time to get action against it and not afterwards.

He saw some circulars there similar to plaintiff's Exhibit IV, although these were in the finished form as distinguished from the proof with the o. k. on it as contained in Exhibit IV. He then identified plaintiff's Exhibit VI as the finished "No Conscription" circular, which is identical with that set out

in the indictment. Whereupon the finished printed "No Conscription" circular identical with that described in the indictment was offered and admitted in evidence as plaintiff's Exhibit VI. This witness observed on the table right in front of him, two bundles of these circulars and picked out several and looked at them. There was some discussion among those present about distributing these circulars on the following Sunday morning early, alloting a certain number to the various precincts in the city. Witness observed a precinct map of the city on the wall of the room. A number of the persons present took these circulars. Witness could not say what was said by Sadler other than that it was in accord with what Wells said as to the actions necessary in the distributing of the circulars.

This witness was not able to identify Morris Pass. There was some talk about vouching for or identifying the various members of the Assembly in order that the meeting might be assured that the matter of the distribution of these circulars would not be told of or spoken about until they had been distributed on the following Sunday morning. Those present were vouched for by the following method: They were asked to rise. Then those who were universally known there were asked to certify whether such persons were trustworthy or not. Brother Wells vouched for the witness. Someone

suggested that the door ought to be watched or guarded, but whether it was in fact done, witness could not recall. This witness remembered particularly that Mr. Wells scoffed at the idea of the necessity of secrecy. Witness was then asked by counsel for the defense if Mr. Wells said there was not any cause for secrecy because there wasn't anything being done or contemplated that was improper or unlawful. Witness answered that he could not recall and that he was not sure on that point. Witness stated on cross-examination that it was the purpose of the meeting to oppose the adoption of the Draft Act before it became a law and not afterwards. Mr. Wells took a more active part in the meeting than the others. Possibly it might be said that he took the leading part, though possibly no more than several others.

There were two delegates from the Central Labor Council present. There was talk among those present of reaching the Washington representative in Congress, so that they could be induced to use their efforts to oppose the pending Conscription Act. The purpose of circulating the paper or pamphlet, referred to as Exhibit VI, to wit, "No Conscription Circular" was to arouse a public sentiment against the passage of the law and not against its enforcement after it became a law. Witness was asked the following questions on cross-examination and made the answers quoted:

"Q. Was there any suggestion by anyone at that meeting—Mr. Wells or anybody else—that force should be used then or at any time in reference to the Conscription Bill or the law which might be enacted thereafter?

A. No, I don't think so.

Q. Not a word of force mentioned by anyone?

A. I don't think so.

Q. Not even a suggestion of that?

A. No, I don't think there was.

Q. They talked about the idea of reaching the members in Congress, didn't they?

A. That was the opinion that I gathered.

Q. To reach the representative of this State in Congress so that they would use their efforts in Congress to oppose this pending Act of Conscription—that was the sense of the meeting, wasn't it?

A. Yes.

Q. And the purpose as disclosed—the purpose of circulating this paper or pamphlet—was to arouse a public sentiment against the passage of the law, wasn't it?

A. That was the intention.

Q. And not against the enforcement of it after it became a law?

A. No.

Witness on re-direct examination stated that a communication had been sent to the Central Labor

Council asking the Council's cooperation in some sort of a demonstration against the high cost of living, and witness attended this meeting for that purpose. Witness stated that defendant, Sadler, stated that they could take some of the circulars up to the Labor Temple where they could be obtained by others on Saturday evening; but this witness on re-direct examination could not state that Sadler had anything to do with the distribution of these circulars other than the talk at the meeting.

DAVID LAVINE was next called as a witness for the plaintiff, who testified that he was a director of the Socialist paper named "The Call." He knew defendants Wells and Sadler. He attended this meeting on the 11th day of May 1917. He arrived at the meeting about eight o'clock. When he got there the rooms were full. There must have been fifty people present according to his recollection. He observed the defendants Wells and Sadler there and observed the "No Conscription" literature (Plaintiff's Exhibit VI) on the table. He picked one of these circulars up and identified it as similar to Exhibit VI. There was quite a general discussion that night relating to these circulars. All the members present joined in the discussion and he could not remember what part Sadler or Wells took as everybody said something. This witness observed

the Socialist Precinct Map on the wall and knows that the map was referred to in the general discussion concerning distribution. Some reference was made during the evening about the attempts on the part of various people to break up meetings of that character and it was suggested that the best thing to do would be to vouch for each other to find out who was there. Reference was made to patriotic organizations and hoodlums as being likely to break up the meeting. Those present were then vouched for in the following manner—some fellow would stand up and a fellow in the room that knew him more or less would say, "I vouch for him." Witness thought somebody vouched for him, but couldn't say. It wasn't necessary because he was known to ten or twelve people present who were members of the Socialist party once upon a time.

On cross-examination witness stated that the discussion took the form of opposing the then pending Conscription Bill before it was passed by Congress. Witness was asked this question on cross-examination by defendants' counsel:

"Q. Was there any suggestion by anybody at that meeting that force should be resorted to in connection with this Conscription Bill that was pending in Congress?

A. No, I am pretty sure of that, because I am

very much opposed to force. I would certainly have protested if there had been anything said upon it.

Q. The idea was to arouse people so that they would reach the representatives in Congress?

A. I don't know. Maybe some people made remarks of that sort. It was a sort of general conversation.

Q. On the subject of this secrecy or attempted secrecy, Mr. Wells, the defendant here, said it was foolish and scoffed at the idea.

A. Well, I was trying to think about that and somehow it must have escaped my mind. It might have been so, but I did not hear it."

This witness was positive that Joe Pass was not there but could not tell whether defendant Morris Pass was there or not. This witness came to the meeting under the belief that the Young Peoples Socialist League was about to meet. This witness did not know who prepared the "No Conscription" circular referred to as plaintiff's Exhibit VI.

G. M. WELTY was next called as a witness on behalf of the Government. Witness attended the meeting in the Epler Block on May 11, 1917, at about eight o'clock in the evening. He knew the defendants Wells and Sadler, observed these two defendants at the meeting, also the witness, Friermood. Witness stated that he was appointed by Mr. Duncan, the Secretary of the Central Labor Council, to

act on a committee with a Mr. Spencer and Mr. Friermood to meet at the Epler Block for the purpose of holding a demonstration or parade, or considering the advisability of so doing against the High Cost of Living. Witness identified Exhibit VI as a circular similar to a number which he observed in the room that night. There was a general discussion about this circular. Two bundles were brought in and put on a table. They were opened up and the circulars distributed to those who requested them. And if they desired to distribute any of these in the precincts, they would come and get the circulars, and there was a notation made of each one and the map was consulted with reference to certain precincts that were numerically numbered on the map.

Wells made a brief address about these circulars and his reasons for them, and said that the wanted them distributed. Witness said: "It was the general sense of the meeting that there would not be enough people there to take all of the circulars. It was suggested that if anybody else would want any of them, they could get them at the Labor Temple the next evening."

Defendant Wells stated that he could not be at the Labor Temple the following evening (Saturday) and Sadler volunteered to be there and give them out.

The question came up as to whether there might be people in the meeting that were not in sympathy with them and might be spies, and that theretofore there had been trouble of that kind. And so it was finally agreed that those present would be vouched, —that is: someone would get up and another would say if they were known, "I vouch for him." This method of vouching was then followed. The defendant Wells vouched for the witness. At this meeting it was said that it was advisable to have a sergeant at-arms appointed so that someone else might not come in there that would not be in sympathy with them. This suggestion met with the approval of the meeting, because there were two sergeants, the witness thought, at that time appointed. It was suggested that persons leaving the hall should go out singly and not let anyone know that they had those circulars given to distribute, or to show them to anyone until Sunday morning—until they distributed them. That was for fear somebody might get hold of them. This suggestion met with the general approval of this meeting, and witness could recall no objection being made to it. Witness did not know whether the suggestion was actually folloved out.

Witness referred to the partition between the rooms and stated that he could not see what was going on at the door. Defendant Wells wanted each

one to take a bundle of these circulars for distribution in his precinct. Witness on Cross Examination stated that it was the sense of the meeting that they did not want to be interrupted and that the idea of secrecy was because of the fear of being interfered with either by rowdies or by the government or by anybody else.

Q. You do remember that when that talk was on Mr. Wells ridiculed the idea of secrecy openly in the meeting?

A. He might have done that.

Q. Didn't you testify to that in the last trial?

A. I might have done so. I don't think that I testified point-blank because I don't recollect it. There was a good many speaking. I have been a member of the Socialist party myself and I know they all want to talk. They have all different ideas. You can't listen to their ideas all at one time. That seemed to be a kind of an open forum meeting and wasn't conducted as usual.

Q. A kind of free for all?

A. Yes, three or four were speaking at the same time.

It was brought out in discussion that there might be spotters around. That was the object of vouching for each person. Witness did not recall seeing the defendants Morris or Joe Pass. He would not know if they had been there. Witness

was asked by counsel for the defense this question:

Q. The sense of that meeting was that they should act in reference to this proposed Conscription Law at that time and not after it became a law?

A. The law had not been enacted.

Q. And the discussion was to take such measures as would be possible and legal to prevent that bill becoming and enacted into a law? That was the sense of the discussion, was it not?

A. I don't know whether it was the sense to do it legally, but at least to defeat that law if possible.

Q. There was talk about reaching the various members of Congress in this state?

A. No. That was not brought up. That has always been the consensus of opinion of them.

Q. Wasn't it discussed at that meeting?

A. It might have been.

Witness could not state whether Wells or Sadler took any of the circulars away with them. He knew that there was talk about the distribution, but knew nothing about the actual distribution or how it was done or handled, "other than that he saw the circulars handed out at this meeting, and that they were received and wrapped up," and witness could not say that Wells or anybody else took any away.

JAMES A. DUNCAN was next called by the Government. He testified that he was Secretary of

the Central Labor Council; that on the 30th day of April, 1917, he attended a meeting in the Good Eats Cafeteria in the evening. He knew Wells and his wife and testified that they and Miss Strong were present. He could not recall anyone else as being present although there was quite a number of people. There was a general discussion in the matter of the publication of Anti-Conscription literature. In this discussion it was recognized as necessary to do something to offset newspaper work that was being done to spread sentiment in favor of conscription. It was felt that a circular or something should be gotten out. This meeting occurred between 6:00 and 7:30 in the evening. The matter of the distribution of these circulars was not talked while the witness was there. The discussion was confined to the preparation of a pamphlet or circular. Mr. Wells was asked to prepare and submit a pamphlet or circular to a committee for approval or rejection. Witness remembered that Wells stated that he was extremely busy and did not have any time to give to the preparation of the circular. He was finally asked whether if they decided to get out this pamphlet he would attend to the matter of printing it, because of his familiarity with printing matters, and heard Wells reply that in all probability he would not mind doing that. He was not there when any collection was taken to defray print-

ing expenses; and did not recall that either of the defendants Morris or Joe Pass were there. He testified that he was present on the 23rd day of May at a meeting of the Central Labor Council and identified plaintiff's Exhibit VII, as a resolution which was presented to the Council by Mr. Wells, stating that it had been pending before the Council for some three weeks prior to that time. This resolution was offered in evidence and thereupon Mr. Bell objected upon the ground that it was immaterial and would not tend to prove any issue in the case. This resolution was admitted as plaintiff's Exhibit VII over Mr. Bell's objection and exception noted. On Cross Examination by defendant's counsel this witness explained that there had been two separate matters of discussion presented about two meetings prior to May 23, 1917, to-wit, the matters of opposing Conscription and also the Importation of Coolie Labor. The Central Labor Council in this previous meeting held about two weeks before that of May 23rd combined or consolidated the two subjects and set them down as the special order of business for May 23rd, the said two subject to be acted upon jointly as one and the same. Witness explained this consolidation by saying that it was considered that 'the two subjects were co-related and the same interests that were seeking to bring about a big influx of coolie labor, were the same interests that were behind the

attempt to put over the Draft Law.' It was felt that they shoud be dealt with as one subject.

At this meeting, to-wit, that of April 30th, there was considerable discussion about the Conscription Act, the sense of the meeting being that something should be done to offset agitation in the Press in favor of Conscription. It was suggested that a protest meeting be held. Witness thought that some of those present at the meeting had gotten in touch with members of the Congressional Delegation. The witness was asked this question:

Q. What was said at that time about the desirability of opposing or of taking action before the law became effective, Mr. Duncan?

A. Why, it was felt right through those meetings that now was the time to act, that it was useless to take action after the thing was done.

And this was Mr. Well's attitude. He was asked this further question:

Q. Was there any suggestion by Mr. Wells or by anybody at that meeting about the use of force, either before or after the Act became a law?

A. None whatever.

He was asked if he knew who prepared the circular and replied that he did not. He stated that his impression was that Mr. Wells did oversee the matter of printing it. He was asked these further questions and made the answers set forth:

Q. You know that he left the meeting with you with a tacit understanding that if the circular was prepared by somebody, he would oversee the matter of printing it?

A. Yes, that was the impression that he left with them as he left.

Q. Now at this meeting at the Labor Temple was there any talk or suggestion by anybody that force should be used to effect the repeal of the Conscription Law?

A. Not one word or one suggestion. It would not be stood for for one moment.

Q. Was the sense of this meeting at the Good Eats Cafeteria and the sense of the meeting at the Labor Temple against the Conscription Act or against the the war itself?

A. Against the Conscription Act.

This witness stated that they opposed the war right to the last ditch until war was declared, then when the Draft Law had passed that he and the other members of the meeting felt they had a right to ask for its repeal as a law most unwise. The repeal was advocated in an orderly way, and that the preparation of the circular was agreed upon the purpose of arousing legal opposition to the passage of the law and for no other purpose. The meeting on April 30th at the Good Eats Cafeteria was an open one and no watchmen were on guard so far as

the witness knew. And there was no suggestion of vouching for or identifying the persons present. The meeting of May 23rd at the Labor Temple was an open public one where anyone could get in who sought admittance. At said meeting there was no suggestion of vouching for or identifying those present.

J. F. BARNEY was next called as plaintiff's witness. He testified that he was caretaker of the Labor Temple of Seattle during the month of May 1917. He recognized the "No Conscription" circular, (plaintiff's Exhibit VI) and recalls that he saw a package of about fifty of these circulars in one of the rooms of the Labor Temple, viz: Hall No. 107. This was on a Monday toward the latter part of May. Witness could not recall the exact date.

They were placed on a pedestal in the Hall and he dumped them into the waste paper receptacle. He did not know who carried them to the Temple, but simply found them on the table or pedestal in one of the rooms in the building.

THOMAS B. FOSTER, testified that defendant Wells was arrested May 28, 1917, and that Fort Lawton is a military reservation in the northern limits of Seattle.

SARAH PASS, sister of the defendants Morris and Joe Pass, was called as the Government's next witness. She identified a signature on plaintiff's

Exhibit VIII, (application for a postoffice box), offered for identificationfi as that of her brother, Morris Pass.

GEORGE C. REID was called as plaintiff's next witness. He testified that he was then employed as a postal clerk in charge of the Postoffice Box Department in the Seattle Postoffice. He identified plaintiff's Exhibit VIII as an application for a postoffice box in the city of Seattle made under date of May 4, 1917.

FRANK B· GREENE was called as plaintiff's next witness. Witness testified that he was emplayed as an agent of the United States Secret Service and was assigned to duty and acting as such in the Secret Service Office in New York City in the month of October 1917. Defendants, Morris and Joe Pass, were questioned by operative Burke in witness' presence concerning their relation to the publication and distribution of the "No Conscription" circulars, while in the witness' office in New City. Witness made certain stenographic notes of the questions propounded to the defendants and their answers thereto. Witness recalled that Joseph Pass told him Morris and Joe had left Seattle on May 28th or 29th to travel East to New York by slow stages, working their way from place to place enroute. This witness stated that Joseph Pass said that he was present at several meeting in Seattle at

which the "No Conscription" circular was discussed, mentioning Stevens Hall and the Good Eats Cafeteria. Morris said he attended two meetings where the No Conscription leaflet was discussed.

Morris Pass told the witness that it was his purpose to circulate them. Morris said something about giving them to his friends. Witness referred to the transcript of the stenographic statement which he took at the time and then recalled that Morris Pass stated that he was at the meeting when they were distributed among those present; that the circulars were divided up among those present; for distribution purposes and further that Morris Pass distributed some of them. Witness remembered also that Morris Pass stated that a collection was taken up that evening amounting to $10.00, which he gave to Mr. Wells to pay for the printing. On cross-examination witness testified that Morris Pass said he attended only two meetings. One of these meetings was in the Good Eats Cafeteria. Morris had stated the date, but witness did not remember just what the date was. Morris Pass did not tell the witness that the second meeting was called for the purpose of protesting against the high cost of living and that was what Morris attended it for. Morris had said something to witness about getting to the second meeting late after the meeting was in progress. Joe Pass said he was at two

meetings. One of these was at the Good Eats Cafeteria. The Epler Block had not been referred to by that particulars name when Joe had been interrogated about attending the meetings. Witness remembered that Joe Pass said he had nothing to do with the preparation of the circular but that it had been prepared before he reached the meeting and entered some objection at the meeting against the wording of the circular, "but not very strong." On re-direct examination witness Greene said that he (Joe Pass) said he was present at the meeting where the draft of the circular was discussed; that the meeting was a sort of an informal one; that there was a general discussion about it and some objections raised to it by the members present. The defendant, Joe Pass, entered some objection to the wording and tone of the circular. Everyone in fact had raised objection to the general tone of the circular. That Joe Pass was asked if he protested against the circular and its distribution and Joe replied that he did not because he was a stranger in the meeting who had casually dropped in and that he did not enter into the general discussion which was carried among those present about the circular. (Joe Pass said that the meeting at which the draft of the circular was discussed was to be for the same purposes as outlined by the American Union against Militarism, and that Joe's purpose in attending was for that reason.

WILLIAM N. FLYNN was next called as plaintiff's witness. He was then holding the rank of Ensign in the Navy but was employed in October 1917 as an Assistant Operative in the United States Secret Service for the State Department at New York. He was present when Morris Pass was interrogated, in the office of the Secret Service Department at New York City, October 13, 1917. Mr. Greene and Mr. Burke were also present. This witness stated that Morris said he had been in Seattle up to the 28th or 29th of May 1917, when he left to work his way to New York. Witness remembered that Morris Pass said that he was present at the meeting at which the circulars were first opened and divided among the various people present, everybody helping themselves; that he had taken ten or twenty and distributed them to his friends. Upon objection being raised by counsel for the defense the court admitted the further statement of Morris Pass with the understanding that it could only be admitted against him individually as the conspiracy charge had ended. Witness was then permitted to testify under the announcement from the Court that his (Morris Pass') testimony could only affect his own individual case and would not be binding upon the others in the conspiracy. Witness then said that Morris Pass said that at the meeting the circular was read and approved in the main and

the money collected from those present to cover the cost of printing it to the extent of about $10.00; that someone asked him to take charge of the money which he did, agreeing to hold it until the circulars were printed. Morris Pass further stated that he was asked to obtain a postoffice box, that he tried to rent one, but could not get references enough to satisfy the authorities; that Box 225 was used and that it was probably secured through Mr. Fislerman, but the witness did not know, stating that he was acting for the "No Conscription League."

C. J. FRASER was called as the Government's next witness and testified that he found a copy of the plaintiff's Exhibit VI, the "No Conscription" circular upon the front porch of his home, which was located about a block from the boundary line of the Fort Lawton Military Reservation on Sunday morning, the 13th day of May 1917. He was asked if he exhibited this circular to anyone else. Thereupon counsel for the defense objected upon the ground that the defendants were not shown to be responsible for the witness' exhibition of the circular. This objection was overruled and thereupon Judge Bell for the defendants was allowed an exception. Witness then stated that he exhibited the "No Conscription" circular to one Mrs. Knight.

MRS. C. J. FRASER, wife of the preceding witness, was next called by the Government. She

recognized plaintiff's Exhibit VI, which her husband found on the front porch of their home on Sunday morning, May 13th. She found three other similar circulars in her mail box. Defendants moved to strike. Motion overruled, same ruling.

DUBOIS MITCHELL, reference librarian of the Seattle Public Library, offered the population statistics for the City of Seattle for the census of 1900 and also that of 1910. The counsel for the defense objected upon the ground that it was immaterial, but his objection was overruled and the census records of Seattle admitted.

ARTHUR ROYCE, court reporter, was next called by the Government and testified that he reported the case of U. S. vs. Morris Pass, cause No. 3752; that he had with him portions of the testimony of Morris Pass given under cross-examination by Mr. Moore, which were as follows:

He was asked at said trial whether he paid for the printing of the circular. He denied so doing. He admitted that a collection was taken up to pay for the printing of the circular. The money was placed on a table at the meeting; that Mr. Wells took part of the money and he took part of it, which he gave to the defendant, Wells, later. He was asked at said trial whether he said he would obtain a postoffice box for the organization and stated that he went to the postoffice to make application for a

postoffice box at the Seattle Postoffice; that the box was for his own use, as well as for the "No Conscription League".

Thereupon the plaintiff rested. This was substantially all the evidence offered by the plaintiff in support of its case in chief. The court excused the jury, which retired from the courtroom.

Mr. Bell, attorney for the several defendants at bar, then moved for a direct verdict as to each and all of the defendants, stating that the grounds of his motion applied equally to all of the defendants, stating specifically "that the evidence is insufficient to show the commission of the crime charged in the indictment, or any of them against the United States."

The court in substance stated that actual force was not necessary as an element of the conspiracy charged, and after argument by Mr. Bell, denied the motion for directed verdict as to each and all of the defendants to which refusal of the court Mr. Bell took an exception, which his Honor allowed, and which was duly noted in the record.

Thereupon the defendant, HULET M. WELLS, was produced and sworn as a witness for himself on behalf of the defendants.

Defendant testified that he was thirty-nine years of age; had worked for a number of years as a postoffice clerk and as a city employee, and was

so employed by the city during the time of the alleged conspiracy; had received some legal training and had been duly admitted to practice law in the Supreme Court of Washington. He had long been connected with the Socialist movement and had taken an active part in Socialist politics, commencing as early as 1904. He stated that there was a national organization, known as the American Union against Militarism, which worked with those Socialists who were inclined to work with them, stating that many prominent Socialists thought that the ends of the Socialist party would be furthered by uniting with any body or society which was pursuing the same object. This Union against militarism had a branch in Seattle. Defendant took part in the movement and attended an open meeting at the Dreamland Pavilion, stating that a number of prominent men, including a public service commissioner, spoke at this meeting, and that he also was one of the speakers.

The object and purpose of the society was to present to the people the view that newspapers of the country would not present at the time, viz: the view that the United States was not in imminent danger of invasion; that we had an efficient Navy and there was no imminent need of greatly increasing the expense of the Army and Navy. Defendant was conscientious in this belief; was strongly against

old world militarism and did not want to see it implanted in this country.

Said meetings were held in Seattle before the declaration of war and were held quite frequently about a year before the declaration. Meetings were held at Dreamland Pavilion and at the Good Eats Cafeteria, and speaking generally followed.

In addition to the open meetings and public discussions a great deal of literature on the subject was received from the headquarters of the society,—one of which was at Washington, D. C., and the other at New York. This literature was circulated locally and read at meetings of the organization as well as in the meetings of the Labor Unions and Councils. The whole purpose of the society and of the defendant was to get before the people the opinions offered by those who were favorably disposed in their point of view to this movement to place it before Congress. This society contiuned its agitation up to the time it was seen that the country was about to get into the war. From that time until the declaration of war, they confined their efforts to trying to bring about an honorable avoidance of the war. After the war was declared by the United States, the society ceased all opposition to the war itself. After the war was declared, the organization kept together because it was thought there would be many occasions which would

arise from time to time, which would require the liberty of the people to be safe-guarded. It was thought that conscription would quite likely become one of the issues and that the society and its members should endeavor to prevent the enactment of such a law.

At this point, Mr. Bell for the defendants asked this question:

"Q. What steps were taken by the local branches, by yourself and other members, with reference to opposing the conscription act?"

Mr. Reames for the prosecution objected upon the ground that such inquiry was immaterial.

Mr. Bell then referred specifically to the Act of May 18, 1917.

Mr. Reames then objected on the ground that such inquiry was immaterial.

The court sustained the objection.

Mr. Bell then stated to the court as follows:

"It would tend to show the matter of good faith in the part of these defendants,—what they did, what they said in reference to this Conscription Act, what they did and why they took part in the circulation of the circular about which so much has been said in the cause in chief."

The court sustained the objection, saying: "The objection to this question is sustained. That may open a collateral issue that is not here, and the

question is so broad that the court must sustain the objection. Of course, some of the matters suggested by you might be proper, but under this question it would not be limited to the things that might be proper."

Mr. Bell noted an exception.

Defendant then stated that he was opposed to the conscription law before it became a law, stating as follows: "I was never so deeply moved over any contemplated legislation as I was over this Conscription Act. Everything I could lawfully do I was determined to do to prevent its enactment. I considered that it was opposed to all of our American tradition."

Defendant wrote various men in Congress in February 1917, and received replies from them, and among them one from Mr. Dill, stating that he, Mr. Dill, was in agreement with his views. Defendants offered to introduce these letters. Mr. Reames for the Government objected to their introduction. The court sustained the objection. Exception noted.

Defendant further stated that he and his associates in the organization referred to, circulated literature, made speeches before different labor bodies and tried to impress upon the people of the United States their purpose to oppose legislation of that character. This was before the proposed draft act become a law.

On April 30, 1917, a group of interested persons of the same organization, to wit: The American Union against Militarism, met at the place they were accustomed to meet, to wit: in the Good Eats Cafeteria in the city of Seattle. It was an open meeting held, however, without notice to the general public. It was so open in fact, that a reporter walked in on them and inquired of the members present the purpose of the meeting. After dinner general discussion followed. About twenty-five persons were present. Defendant Wells was sure that neither of the Pass brothers were present, but he saw them at a later meeting. Most of the discussion at the meeting was as to what the general idea was in regard to what should go into the circular.

The sense of the meeting witness understood it, was that the proposed draft legislation in Congress was unconstitutional; that it was proposed that a circular should be prepared in which defendant proposed that Daniel Webster should be quoted, because in some case in Court, Webster was supposed to have argued against the constitutionality of such a law in 1812; that in addition witness wanted it shown that such legislation was entirely out of harmony with American institutions. That it tended to encourage militarism and would inevitably result in a war in the end. The members of this meeting on April 30, 1917, were respectable, law-

abiding men and women. There was no talk or suggestion of using force or employing force, or advising the employment of force. Such an idea was absurd and no such thought was ever expressed by anyone.

Asked to what the meeting finally concluded to do about getting out the circular, defendant stated that he left early, as Mr. Duncan, the Government witness, had stated, to attend a meeting of the Electrical Workers Union.

Discussion was still on when the defendant left. He stated that they tried to press him into preparing a circular, when he had expressed his idea of what ought to go into the circular. He said that he had enough to do,—did not have the time and so begged off. As he was going out, he was asked if he would mind attending to the printing of it because of his experience in that line. Wells must have promised that he would attend to the printing of it because he did. No form of circular was adopted before the defendant, Wells, left the meeting. The members present had not come to any conclusion when he left. There was not to be anything drafted that night. It was simply put into somebody's hands to do.

Another meeting was called for the following Friday, which would be May 4, 1917. This meeting was to receive the report of the committee on the

circular and provide means for its being published, and after it had been printed there was to be another meeting to provide for its distribution.

Friday evening, May 4, 1917, the second meeting was held at the Good Eats Cafeteria. The defendant's wife came in after the others had eaten their dinner. Well's wife was there when he went in. Defendant Wells was just in time to hear some discussion toward the last. The circular had been prepared and read when he arrived. The committee, whoever they were, had prepared it, had passed it over to a table where Morris Pass was sitting. Pass had been prevailed upon to act in a secretarial capacity. At the April 30th meeting the secretary had been chosen but he either declined to act or failed to attend. Morris Pass was selected to act as secretary. Defendant, Morris Pass, according to Wells, was somewhat reluctant to take it, but was coaxed to do so by those preesnt and Pass kindly agreed to do so, if there was not too much work connected with it. Witness said, "So, as I remember, this manuscript of the pamphlet which had been prepared was lying on the table where he (Morris Pass) was sitting. I am not sure whether it was in front of him or not; but I—after my wife refreshed my memory, I recall it in this way, that we walked over to the table and got the circular there, looked over it and objected to one of the phrases that it

contained, because I thought it was too strong."

Witness called attention to the fact that there might be danger of civil war in the event the conscription law should be enacted; that the language had a very bad sound and that they should strike some of it out and a portion of the circular was stricken out. Witness said, "I overlooked another clause which expressed the same idea that if we must fight and die, and so on, let it be here instead of over there."

Witness did not prepare the circular, had nothing to do with its preparation. Witness stated from the witness stand that he could give a pretty accurate surmise as to who had written it, but stated that inasmuch as he had been dismissed from the Public Service in the City of Seattle, he would not disclose the identity of that person, even if he knew definitely, which he did not. He stated that he would have no objection to disclosing his own part in the preparation if he had taken any, but witness denied taking any part in the preparation of the circular whatsoever.

He said it did not express his entire sentiments, nor was it couched in the language he would have used had he written it.

At this meeting there was no talk about using force, neither was there any expression of that kind. The people present who participated in the meeting

were indignant that something was being put over by the great industrial interests of the country; that those present believed, were in favor of compulsory service. They thought that unfair pressure was being brought on Congress by the daily papers for the purpose of obtaining a permanent system of military service. They expressed the thought at the meeting that the conscription law was wanted as a permanent institution, rather than a necessary step in the pending war. At this meeting on May 4th, a collection was taken up to pay for the circulars that would be printed. Defendants Joe and Morris Pass were there for the first time. Joe Pass took no part in the meeting at all. Morris Pass acted as temporary secretary. Witness was not clear whether he took the circular from those present at the meeting or whether he had received it, as he stated at his former trial, from Morris Pass at the Labor Temple. Witness said, "my wife, who has a great deal better memory of details, heard me testify and said I was mistaken, that I got the pamphlet that night."

The manuscript was typewritten. Morris Pass gave him some money at the Labor Temple, which was the same money that was collected on the night of May 4th. After witness received the copy for the circular, he carried it around until he got money from Morris Pass to make a payment on the printing.

Defendant took the circular to the Trade Printery. Witness suggested to Mr. Listman, who testified for the plaintiff, that it would be well to leave the union label off the circular as it might injure Mr. Listman's business.

Witness stated that the meeting in the Epler Block, May 11th, was an open one. It was suggested that someone present in the meeting might not be in sympathy with those present and it might lead to the meeting being broken up. Defendant laughed at the idea and tried to discourage it, but their ideas prevailed. The feeling of suspicion on the part of the members present dated back to the time when the Socialist headquarters were destroyed and their property burned and broken up. This meeting on May 4th was the only meeting which defendant observed defendant, Joe. Pass.

Printer's proof of the circular (Exhibit IV) was sent to defendant Well's office in the County-City Building, where he was employed in the Lighting Department. He corrected the proof and took it to the office of the Trade Printery, where he turned over to one of the employees. He made the printer's proof corrections referred to by the Government witnesses, and wrote on the back thereof when he wanted delivery made. He stated that the Government's testimony was correct with reference to the correcting of proof and paying for and pro-

curing the printing to be done at the Trade Printery.

Wells received said printed circulars, took them to the Epler Block for the Friday night meeting on May 11th. The meeting place in the Epler Block was the regular headquarters of the Socialist party. Witness understood that arrangements had been made whereby he and his associates were to have the hall that night for the purpose of their third meeting. Witness wanted the meeting held in conjunction with the Socialist party so that the same would have a good attendance and was prepared to make a little talk as to what he and his associates in the No Conscription League were trying to do. Witness said, "So, I didn't want to leave the circulars in the hall in the first instance, because I knew I would be late getting back from home, and there would be a good many people there and they would be opened up and scattered around and the people would be familiar with the contents, and I would not be able to hold their attention so well."

Wells brought the circulars with him, arriving somewhat late, and found that the arrangements had not been properly made for having the hall to themselves. There were people there for three different purposes. A committee meeting for the High Cost of Living met there, composed of Mr. Welty and M. Friermood. There were several others

present who were not interested in that movement but not on the committee; and there was a committee representing the Young Peoples' Socialist League; and there were still others who came to attend the No Conscription League meeting.

Witness stated that he explained that there was a conflict of dates and asked whether or not the No Conscription League could have the right of way. This was agreed to by those present and the meeting progressed.

Witness said "So I got up,—I expected to see Morris Pass there. I thought that he as secretary ought to have made arrangements. He wasn't there." He then stated that it devolved upon him to do the explaining and he explained in general what the purposes of the No-Conscription League were. Witness then left the meeting, went out and brought in his pamphlets for distribution. They were opened up and everybody who would take some were given them for distribution in their home precinct. This was, as the witness explained, the time honored way in which the Socialists distributed their literature. The party for a number of years had tried to maintain the same kind of an organization as the Republicans and Democrats, viz: a precinct committeeman in each precinct, who attended to the work and distribution, leaving Socialist literature on the door steps of the homes in the city on

Sunday morning. This was the method that was adopted for distribution.

Witness stated that most of those present took circulars for distribution.

After hearing my talk on what our purposes were in trying to defeat the conscription law, as I regarded it anti-American, even those that came there for a different purpose expressed themselves in sympathy, and most of them took circulars.

Asked as to whether he took any personal part in this distribution, Mr. Wells stated that he distributed quite a number himself. Sadler had nothing to do with the distribution that the witness knew of.

Defendant Sadler was present when the witness made a talk. Sadler didn't understand at the time witness got up and made his talk anything about what they were trying to do as witness thought, but if Sadler said anything at all witness thought he agreed with the general purport of witness' talk.

Q. What did the Pass brothers have to do with it?

A. They didn't have anything to do with it other than Joe Pass happened to be at this meeting at the Good Eats Cafeteria and took no part whatever. There was never a worse perversion of justice or authority than the bringing of him back here to answer in this case just because I mentioned that

he happened to be present at a meeting just the same as James Duncan or Miss Strong or my wife.

Witness stated that at the former trial he testified that he met Morris Pass in the lobby of the Labor Temple and took the manuscript which later was printed as the circular referred to as Exhibit 6 from his pocket and gave it to him. Witness, however recalled more clearly during the present trial that he got the manuscript from Morris Pass at the Good Eats Cafeteria and got the money at the Labor Temple. He stated in response to Mr. Reames' inquiry that he must have had the typewritten manuscript in his possession in his pocket for several days. Asked particularly, said he had it in his possession at least three days.

On cross examination the following questions and answers were put to and made by defendant Wells:

"Q. Then at the time that you got it from him you read it over and objected to some of its phraseology relating to civil war?

A. Yes.

Q. You read the circular over at that time to the extent that you knew that there was some objectionable matter in it?

A. I certainly didn't read it all over, or I would have struck out exactly the same phrase later on.

Q. You mean to say that you at that time simply read over the portion that you struck out?

A. Certainly, they told me I was to get the circular printed, and I went over and got the circular and glanced over this first part of it and noticed the phrase about civil war and struck it out.

Q. You didn't read the rest of the circular?

A. Not at that time, no."

He did not recall that he read it carefully during this time or that he looked at it from the time he received it from Morris Pass until he gave it to the printer. He admitted that if he read it at all it was only "superficially".

In explanation of this term witness said, "I would read those headlines in which I am in accord. I would read about the constitution and I would read the part from Daniel Webster. All that I would agree with. Reading hurriedly, that would give a general idea."

He delivered the same to the Trade Printery some time prior to May 11th and some time after May 4th. "Witness admitted that there had been a discussion between him and Listman about leaving off the shop number from the union label on the circular. Witness suggested that if it was likely to hurt Listman's business any, it would be a good thing to leave it off. Witness knew a paper like the Post-Intelligencer would be likely to knock. He denied that he left it off for any reason connected with the District Attorney." He directed the printer to

print twenty thousand copies at the agreed price of twenty dollars. He paid ten dollars at the time and ten dollars later when he received the bundle of printed circulars, making both payments to the printery in person. He asked them to send the proof to him. He received the proof probably Thursday, before the meeting on Friday night, May 11th. He corrected the proof immediately after work at five o'clock on the day received and took it down to the Trade Printery. He made some corrections in the manuscript. Put in the letter "R" before the word "Republic", correcting the word "resist", it being spelled "rezest."

One place where the word "as" inserted didn't make very good sense, witness could see that the word should be "so." He wrote in the figures "225," referring to the postoffice box number; signed the same as stated by the Government witnesses, writing the phrase, "O. K. with corrections."

Witness stated that he personally took the corrected proof manuscript from his office down to the printing office. There he wrote on the back of the proof the following words, 'Corrected proof. Would like circulars for Friday evening, and signed it 'Wells'.

Witness' attention was then called to his testimony at the former trial where he was asked how the shop number came to be stricken from the proof,

and witness had then testified that he knew Mr. Listman to be cautious and conservative in his views and that Mr. Allen, U. S. Attorney, had been making rather flamboyant threats as to what they were going to do. Witness admitted that he had given such testimony at the former trial and that it was true.

Witness was interrogated about reading the manuscript for purpose of proof. He was asked whether he did not read every word of the circular by Mr. Reames. He replied that he read every word of it, but simply as a proof reader, paying particular atttention to the spelling, punctuation, and proof, without attempting to gather the sense, stating that he had no idea and didn't appreciate at the time he placed it in the printer's hands that there was any objectionable language contained in the circular, admitting, however, full responsibility for placing the same in the printer's hands. Witness was asked for the names of the people whom he had referred as too cowardly to take responsibility for the circular, and in reply said that if he knew he wouldn't tell and this because he himself had suffered persecution. As to distribution, he stated that he was not solely responsible for it, but distributed about fifty or possibly one hundred out in the district where he lived, going from house to house early Sunday morning. Distribution by him was made in broad daylight at houses where many of the peo-

ple were up, because he observed smoke coming from the chimneys. It took him about three-quarters of an hour to distribute the bundle of circulars which he took for that purpose. He probably took a precinct map and followed the lines of a precinct. Witness knew nothing about the circulars which were distributed in the Fort Lawton district. He did not know the precinct committeeman for that district. Asked if he could find out who he was, stated that the precinct organizations went to pieces some time ago and the precinct organization was disrupted. Witness said in this connection, "We only had some of the most faithful workers with us on that work."

Witness stated that he did not know more than four or five of the forty or fifty persons who attended the meeting May 11th. Witness testified that he did not see Morris Pass at the meeting held for the purpose of distributing the circulars. Attention of witness Wells was then called to his testimony on the former trial wherein he stated that Morris Pass did not come to the distribution meeting on Friday night until quite late. In reply he stated that probably his recollection at the former trial was clearer and he would say that Pass did come late. Witness was a little wrought up when he found three meetings there. As long as Morris Pass had accepted the secretaryship, witness thought he would arrange for the hall.

Witness testified that the meeting on May 4th was the first one at which he saw Morris and Joe Pass. Asked if he did not testify at the former trial that they attended the meeting of April 30th, replied that he thought they did, but having talked it over with his wife, whose memory was very good, he was at this trial absolutely sure that they were not there. Witness admitted that he had said nothing at the former trial about the meeting of May 4th. He said: "We were never asked anything about the other (meaning the meeting of May 4th.) There was talk about a meeting, and those meetings being a few days apart, and my wife and I being at both meetings, I made a mistake about the Pass boys. They were not at the first meeting, as I know now. My wife cleared that up afterwards." Witness stated that he was familiar in a general way with the National Defense Act. Witness did not know whether he got his general idea of the National Defense Act from reading it in the statutes or in the newspapers. He had no recollection of testifying at the former trial that he was familiar with the Act. He had read the Proclamation of Congress on April 6th, declaring war, in the Current News. He knew that Morris Pass was going to rent a postoffice box, as it was discussed at the May 4th meeting, stating that some of the members present thought it necessary to give some address in order to fix responsi-

bility, otherwise people wouldn't pay attention to the circulars, thinking that it was of pro-German origin and that it would not show that it was against militarism, which was the object of the meeting. During the meeting it was suggested that a post-office box be used and that of the Socialist World could be obtained. He did not know the number at the time, but learned from Morris Pass that the number was 225. Pass called him up on the day that witness read the proof, and said that he had not been able to rent a box and it was then that the box number 225 was selected, which was the one used by the Socialist World.

Witness testified that Morris Pass did not tell why he had been unable to rent a post-office box, and then his attention being called to his testimony at the former trial he said that Morris Pass telephoned him that the postoffice authorities were holding him up because he could not give a reference, and thought that his tetsimony at the time was true, but the fact was Morris gave him the number and he put it on the proof sheet. On re-direct examination by Mr. Bell, Wells stated that other ways and means of getting anti-conscription sentiment aroused were discussed, viz., mass meetings and parades, etc. It was the sense of the meeting that while these methods might be adopted later, to scatter the anti-conscription idea, it would be better to

distribute the circular in the manner in which it was afterwards done. Mr. Wells was then recalled and offered as a witness in chief and interrogated by his counsel concerning the resolution at the Labor Temple on May 23rd, which he offered before that body. In reply he stated that before May 23rd a resolution had been offered on the subject of coolie labor. It was intended to take up the discussion a week earlier, but for some reason it was postponed for one week. On May 23rd the resolution, identified as Government's Exhibit "7", was offered by Wells and, as he stated, showed the difference between his attitude then as against his attitude before the Conscription Law was passed, because, in the resolution Congress was asked to modify one particular part of the law, viz., that the Congress recognized the rights of the conscientious objector. Wells stated that the resolution was intended to bring about a modification of the law so that there would be no discrimination; that he accepted the law as inevitable and simply asked for a modification in one particular. He prepared and presented it himself at the regular meeting of the Seattle Labor Council on this date, viz., May 23rd. That 75 to 100 delegates were present at the meeting of the Seattle Labor Council. There was no suggestion at that meeting about the use of force in objecting to any law of the United States. The resolution

was carried by a large majority, only two members dissenting. The witness wrote the resolution offered on May 23rd himself in his own hand writing. Witness testified that the correction in pencil on Government's Exhibit VII was made by him in his hand writing. Witness was asked what he meant by the following words in said resolution: "Those whose ties of blood and birth would compel them to either resist conscription or to crush with fratricidal brutality the best impulses of the human heart," and if the witness did not mean the Germans and Austrians. The witness answered that he meant those who probably had relatives fighting on the other side, and upon the question being twice repeated, the witness said that he meant a certain part of the Germans and Austrians who were conscientious objectors. Witness did not at any time advise or encourage anyone to refuse to register under the Draft Act after it became a law. Knowing that one of his brothers had conscientious objections to the draft he advised him to claim his exemption.

ANNA LOUISE STRONG was next called by the defense and testified that she had resided in the City of Seattle for ten years and had known Mr. Wells and Sadler for a long time, and had no acquaintance with the Pass brothers. She was connected with the American Union Against Militarism, attended a number of its meetings held by the

Seattle branch before war was declared. She was asked as to the purpose of the local branch and the general organization. At this point Mr. Reames objected on the ground that the question was immaterial. Mr. Bell then stated that it was preliminary for the purpose of leading up to other questions. The court sustained the objection and exception was noted by Mr. Bell. Up to the day war was declared members of the association, including the witness and Mr. Wells, were quite active in getting a straw referendum and wiring the results to Congress daily. After the declaration of war the organization or group practically went to pieces. One or two meetings were held to discuss whether any further activities should be undertaken. Conscription was the first subject discussed. Members of the organization knew that it would be one of the first things to come up. Witness was present at the meeting of April 30th in the Good Eats Cafeteria, three or four weeks before the Draft Law passed. The bill was then pending in Congress. This was an open meeting, at which thirty or forty attended. There was a general discussion of several things, but the sense of the meeting was that something should be done to prevent the passage of the Conscription Law. Some communications from the East were discussed. The feasibility of holding parades and massmeetings was also discussed. The idea of hold-

ing parades was discouraged and dropped because, in view of the public feeling, it was thought it would provoke a disturbance. The main discussion centered on literature which it was thought could be obtained from the East. It was then observed that this literature could not be obtained in time. Matters were pressing on and steps should be taken before the law passed. The meeting finally concluded in favor of getting out some literature. Witness remembered that Mrs. Wells was present with Mr. Duncan. She was asked to serve on the committee, but didn't have time. Mr. Wells also refused for the same reason. He was then asked, because of his familiarity with printing matters, whether he could handle that end of it. Wells replied that he would be glad to look after that phase of it. Wells said this just as he was putting on his coat to leave and left before the meeting was concluded. No circular had been prepared up to this time. The contents of the circular were discussed, "only in a very sketchy way". "One of the suggestions was that the circular ought to be very short and to the point.

Witness said, "It was suggested, I remember one of the suggestions was that the circular ought to be very short and to the point, that it should just make one point. We thought we could cover only one,—whether the point should be made that the person getting it should write to Congress or whether the point presented should be that the per-

son getting it should come to a mass meeting, caused some discussion.

The exact details of the circular were left and not settled at this meeting, nor was the particular language of the circular adopted. The general purpose of it, however, was to oppose the passage of the Conscription Law, which was then pending in Congress. A good deal of discussion was had between the members to the effect that they had all written and telegraphed to Congress so much that it would be better to get some aditional people stirred up to do the same thing and the circular idea was finally adopted at this meeting. The circular was adopted as a means of arousing public sentiment generally. There was no suggestion about using force or engaging in forcible opposition to the Selective Draft, the only suggestion of force at all, which came up in the discussion was to the effect that a possible disturbance might result in arousing public opinion and that some means should be adopted to get the information before the public, which would not be of a sort to stir up trouble. It was the sense of the meeting that parades and mass meetings might do this. The entire members present were against the adoption of the then proposed Draft Act or Conscription Bill. Witness did not remember whether defendant Sadler was present or not, but would judge that he was not present, nor

were Morris and Joe Pass. The matter of distribution was then discussed to much greater extent than the actual contents of the circular, because it was known that the distribution would have to be made very soon if it was going to be effective, and it was suggested that if made Sunday morning it would reach a large number of people who were then in their homes, and the house to house circulation was deemed the best method of distribution. The suggestion was made that if all got out at one time before any one was up the effect of publicity would be better, as people would be in to ask of their neighbors, "Did you get one?" Witness was asked this question:

Q. What were you trying to accomplish—what was the meeting trying to accomplish by scattering these circulars broadcast over the city?

A. To make people feel if they didn't want Conscription that it was time for them to act—better do something about it, pass resolutions and take interest in their laws.

The meeting was composed of Socialists and other representatives from the Labor Temple. Witness remembered that a very large proportion of the meeting was composed of representatives of organized labor and of the Socialist party. There was a great deal of discussion, among other things, as to how far in the war the Nation should go. Var-

ious communications from various Congressmen were referred to. Witness could only remember Wells and Duncan among the thirty or forty people who were present. On cross-examination by Mr. Reames she would not state positively whether Morris and Joe Pass were there, but her impression was they were not. A collection was taken at this meeting. Money was laid on the table for that purpose. This collection was for the purpose of defraying the expense of the circular.

Witness thought very likely that she contributed to that fund but could not know who was going to prepare and write the circular. That had not been decided. Her clearest recollection was that just as she was going the group at the other table was concerned over that with an endeavor to get two or three people there to take the burden. She did not know who wrote the circular.

The group which attended this meeting was not very large. She did not remember who acted as chairman, because the regular president was not there. She was not certain whether one person acted as chairman all the time, nor whether it was a man or woman, but she was rather inclined to think it was a man.

Witness never saw the circular before it was distributed, had nothing to do with the distribution itself and saw it for the first time when it was pub-

lished in the newspapers. On re-direct examination witness stated that the personnel of these meetings varied a great deal from time to time. Meetings of the League extended back to the time the country seemed to be in danger of getting into war with Mexico.

MORRIS PASS was next called as a witness on behalf of the defendant. He stated that he was not present at the meeting of April 30th, but was present at the meeting of the Good Eats Cafeteria on May 4th. This was an open meeting at which about thirty people were present. Defendant Wells and witness' brother, Joe Pass, were at the meeting. Joe Pass took no part in the meeting at all or in the subject under discussion. Witness stated that the meeting was in progress when he arrived; that part of the circular had been read and he only heard a portion of it, perhaps a third or a half. After this general discussion followed and more or less criticism was indulged in. Some parts of it were eliminated. Witness could not recall, however, just which parts they were. Wells joined in the discussion, according to this witness, making the statement that it was objectionable and had a tinge or tone of yellow journalism to it. Wells' criticism was of the form of the article and not of the purposes of it. The purpose of the meeting, as the witness understood it, was to create sentiment among

the people of Seattle to appeal to Congress to consider the law very carefully. The Selective Draft Act was then pending in Congress, but had not then passed. There was much discussion as to the unconstitutionality of such a law and that it was opposed to the history and traditions of this Government. Asked as to what arrangements had been made for printing it, witness stated that these arrangements had evidently been completed, for he didn't find out who took care of the printing until later. During the meeting someone was asked to act as secretary. Defendant Wells was asked. They all stated they had no time to attend to it and witness was asked to take care of the secretaryship. He offered the same objection and the members present then suggested that all they wanted was to have someone arrange for a postoffice box. Witness agreed to undertake to do that. Witness went to the Postoffice Department, procured a blank requiring him to give two people for references and entered his application for the box. Returning later he found that one of his references had not responded and as the box was wanted for immediate use he called up Mr. Wells and told him he could not obtain the postoffice box. At the meeting the matter of using the Socialist box, No. 225, was discussed. Everybody agreed to this, except one or two, who thought it best to have a box for that special pur-

pose. Finding that he could not obtain the box in time, he called Mr. Wells. The discussion at the meeting was to take some steps as to prevent the passage of the law before Congress should enact it into a law to urge as many people as possible to co-operate with the organization to bring forth its aims. Mass meetings and parades were discussed. A collection was taken up, the money placed on the center of the table. This was at the meeting in the Good Eats Cafeteria. After the circular had been read general discussion followed. Witness had nothing to do with the circulation or distribution of the pamphlet.

Witness testified that he had no connection with the matter other than what he had related on his direct examination. On cross-examination witness stated that he was not at the meeting where the distribution was discussed. He did not know who wrote the circular, nor anyone who does know; saw the printed circular for the first time on the porch in front of his house. Witness attended a meeting in the Socialist headquarters, at which the possibility of discussing the high cost of living was engaged in. This meeting was after the meeting of May 4th, to-wit, on May 10th or 11th, at which the money was collected. At the meeting of May 4th witness did not observe any printed circular was there, but witness did not hear the entire contents

read, as some portions of it had been cut out, and could not state what portion of the circular Mr. Wells objected to, although witness was present when Wells objected to certain portions. Witness never talked with Mr. Wells as to who wrote the circular. The members of the meeting knew that the witness was not a citizen of the United States, but that made no difference and his citizenship was not discussed. It was understood that he was not a formal secretary, but was merely acting to look after the matter of the postoffice box. Witness was born in Russia and came to the United States when nine years of age and was then twenty-three years of age. He had never declared his intention to become a citizen of the United States, nor had his father ever applied for citizenship.

Asked specifically whether he attended the meeting of April 30th, replied that he did not, stating that the first one he did attend was the meeting of May 4th. Witness stated that he went to the post-office to rent the box about noon. The meeting was held on May 4th after dinner in the evening, between six and seven o'clock. Mr. Reames called his attention to the application for postoffice box, which he had stated that he signed at the noon hour, and was asked if made out in the noon hour of May 4th how it was possible that the matter of the post-office box was not arranged for until six o'clock

that night. Witness could not account for this, but stated positively that he was present at the meeting on May 4th. This was the only meeting he attended in which the postoffice box discussion arose.

Q. (By Mr. Reames.) Assuming that the postoffice records are correct and that you made the application on May 4th and your testimony is true that you went down there at noon, it is inexplainable.

A. It is undoubtedly a mistake.

Witness stated that his brother, Jos. Pass, was with him at the meeting and the only other person whom he knew at the meeting was Mr. Wells. The meeting on May 4th was the only one that witness attended. There were about thirty people present, some of whom were women. Witness did not know who was chairman of the meeting. Witness took charge of nine or ten dollars at this meeting. Finding Wells was not present, someone suggested that the money should be given to him. Witness then stated that he would be at the Labor Temple and would attend to that. Witness was not a member of the "No Conscription League" and took no part in the discussion as to what should go into the circular and assumed no responsibility for it at all. Witness was then asked if he was not asked the question in New York City in the office of the secret service whether he was present when the circulars were divided up for distribution. Witness stated that he

did not make such a statement. He was asked if Wells did not leave the meeting, if he did not say that Wells was there in the earlier part of the distribution, and whether he did not take some circulars for distribution. Witness recalled that such questions were asked, but that his answers were not as indicated by Mr. Reames. Witness was asked whether he did not say in New York City at the secret service office that he had a dozen or two of these circulars and handed them around among his friends. Witness replied that he did not so state. Mr. Reames then propounded a number of questions to the witness, asking if these questions were not asked of him in the secret service office in New York and if he did not make certain replies to them, the substance of which was that the circular was read, money was collected, that the witness took care of the money and that the funds were to be turned over to him because he was about to leave Seattle. Witness' attention was then called to this occasion, which was fully indentified, when he was questioned by United States secret service men in New York City. Witness denied that on said occasion he had admitted that he was present at the meeting when the circulars were divided up for distribution; denied that he had said Wells was there in the earlier part of the distribution, and denied that he said that he had circulated some of them, the exact number

whereof he did not recollect; that he had not left any in doorways or halls or like that, but had just handed them to his friends; that he had had about a dozen or two dozen of those circulars. Witness admitted that on said occasion in New York he had told the secret service men in language which in substance carried the thought that he had first acted as secretary at the meeting when the circular was read, and it was arranged some way or other that he should take care of the money. About ten dollars was donated then and there by people in the meeting; that he had more time than any one else and some one had suggested that he take the money. Witness admitted his participation in the meeting of May 4th, but denied that he stated in New York that the money was given him because he was about to leave Seattle. He denied stating in New York that he was present at a meeting when the distribution took place. He left Seattle on May 28th on the day his brother Joe was married in Tacoma. Witness left, together with Joe. Witness did not know that Wells had been arrested the day he left for the East. Asked by Mr. Reames as to what name he used after leaving Seattle, Morris Pass replied that he used his middle name, which in Hebrew, is Lev. In making the trip across the country he used the name Levine, to-wit, Morris Levine. His full name is Morris Lev Pass.

Witness was not known in Seattle as Morris Levine. Since his folks were in Seattle known as Pass, it wouldn't be appropriate for him to use a different name than his folks.

He reached New York the 10th or 12th of September. He registered in Sandpoint, Idaho, under the Selective Draft Act on June 5, 1917, as Morris Levine. Being migratory, as he termed it, and intending to work from city to city enroute to New York, he gave his address as Butte or some other point in Montana. Cross-examined further by Mr. Reames as to a meeting held at the Socialist headquarters in the Epler Block two or three days before the Sunday when the circulars were distributed, witness admitted attending such a meeting, and that the meeting was held on about May 10th or 11th. He was asked whether it was the identical meeting the other witnesses testified about and he said they evidently referred to another meeting. Mr. Sam Sadler was present at this meeting in the Epler Block and as witness understood, some other men from the Central Labor Council. He recalled that this meeting, among other things, was called to discuss the high cost of living, and that some pamphlets or circulars were on the table, but didn't know what they were and didn't know anything about their distribution—the circulars were not discussed at the meeting which he attended. He could not state

whether Mr. Friermood or Mr. Welty were present at this particular meeting or not. Dave Levine, the Government witness, attended this meeting, according to the witness' recollection. Asked as to the meeting referred to he stated that it was held in the Epler Block at the Socialist party headquarters on the third floor of that building on the Friday night before the Sunday on which the circulars were distributed. There is only one Socialist Headquarters in the Epler Block."

There were some loose circulars on the table. Witness was at this meeting late in the evening. He could not say whether the circulars there were the same as Government's Exhibit No. 6. He observed that the circulars were scattered about upon the table. He didn't know what the circular was about for he didn't read it, but understood that the circular was the same that the Government introduced as Plaintiff's Exhibit 6. On Redirect Examination the witness stated that he arrived late and nothing was said about distribution after his arrival. This meeting was called, among other things, to protest against the high cost of living and the circular was not discussed. The only meeting the witness attended where the circular came up for discussion was the one held at the Good Eats Cafeteria. He had nothing to do with the preparation of the circular, its contents, its printing or its distribution. Asked by coun-

sel for the defense on Redirect examination he stated he was without counsel at the meeting in the office of the secret service at New York City and that the examining officer would say, "Omit that one," and "Take down this one," referring to the questions and answers and that the statement to which his attention was called by Mr. Reames did not accurately record what he said. Witness stated that he registered in Sandpoint under the Draft Act and kept in touch with his Local Board; that he filled out his Questionnaire and filed it, giving his name then as Morris Pass.

ON RE-DIRECT EXAMINATION by Mr. Bell, Morris Pass stated that none was present during the interview in the office of the secret service agents in New York City except the three secret service agents. He further stated that they were badgering him with questions. He was asked this question: "They were threatening you? A. Yes, sir."

Q. What did they say about putting handcuffs on you if you would not come peaceably?

A. When the detectives came to me first I asked if there was any warrant out against me. I said is there any reason why I should come? They said that they wanted to interview me. They showed me some handcuffs and they said which did I

prefer to do, come peaceable or that the officers should force me.

Q. Did you try to get counsel?

A. I did.

Q. Were you permitted to do so?

A. No, sir.

He further stated in response to questions by Mr. Bell, if he was ever asked to sign the so-called card. He replied "no, sir."

On RE-CROSS EXAMINATION Mr. Reames developed the fact that he had been arrested and was out on bail when he filled out his Questionnaire. Referring to the dates upon which the collection was made he said that the money for the circulars collected at the meeting on May 4, he delivered to Wells for the printing of the circulars after that. He attended a meeting subsequently when the circulars were present on the table. Witness did not recall that he saw Wells on the night he saw circulars on the table in his answer to Mr. Reames on Re-Cross Examination.

JOE PASS was next called for and on behalf of the defendants stated that he was one of the defendants; that his name was Joe Pass, that he was a brother of Morris and acquainted with defendants Sadler and Wells. He married on May 31, 1917, and left Seattle the day of his marriage. He recalled that he was present at a meeting in the Good Eats

Cafeteria where there was some discussion of the proposed Conscription Act. He recalled that the date was May 4th. His brother and Mrs. Wells were also present. He thought Sadler was there but at the time of trial was not sure. He had seen Sadler at a number of these Socialist meetings. Wells and his wife were there but he was not certain about Sadler. Asked as to what prompted him to attend the meeting he replied that on May 1st, International Labor Day, at a meeting in Stevens Hall, it was announced from the platform that a very important meeting was to be held at the Good Eats Cafeteria a few days later. The purpose of the meeting was not stated. He understood that the American Union against Militarism would hold the meeting, viz: that it would be held under the auspices of the American Union against Militarism or League against Militarism. Arriving at the meeting witness stated that he did not take any part in it at all. He ate various things during the dinner, remembered that a typewritten draft of a Conscription Circular was read. He did not remember who read it. He had come in late and was still eating when the discussion was taken up. He was engaged in conversation most of the time by the woman sitting at his right. He understood the purpose of the meeting to be to adopt a plan to agitate against the passage of the pending Conscription Act. Ac-

cording to the witness there was no suggestion at any time while he was present that force be adopted to oppose the passage of this law, or in fact any other law of the United States.

Witness testified as follows:

"Q. When you were asked your opinion of the circular what did you say?

A. I said I didn't like the language of the circular."

According to this witness, the particular language of the circular was not voted upon, nor adopted by the meeting and witness took no part in any voting by the members, if such took place, which, in fact, he did not recall.

DEFENDANT JOE PASS took no part in the collection, contributed nothing toward it, and did nothing in connection with the preparation of the circular. It was the first meeting the witness attended and the circular had already been reported upon. Witness attended no other meeting.

He first observed the circular in its printed form when it was found upon the front porch of his house. He also saw it in one or two other places in the city and read about it in the newspapers. He left the city two or three weeks after the circular had been published. Mr. Wells had been arrested just before he left the city. He first learned that the Government connected him with the matter after he

had been in New York about ten days or two weeks.

He left Seattle on May 31st for New York, working at odd jobs from place to place enroute. He registered in Sandpoint, Idaho, under the name of Joe Levine.

In December after his arrest he filled out his Questionnaire, notifying them at the time of his address, all under the name of Joe Pass. According to this witness, he thought that Sadler was present at the meeting in the Good Eats Cafeteria, but could not swear to it.

ON CROSS-EXAMINATION, he told Mr. Reames that he had not left secretly, but that he told of his purpose to go to New York to his brother Dave. Witness' name is just Joe Pass.

Lev or Levine is not his middle name. He has no middle name. Witness took the same name that Morris took because Morris had travelled under that name two summers before. Witness had never been on the road before. This was the first time that he had ever used an assumed name.

Witness never told any registration officers that his address was New York City. Witness did not tell the registration officers his name was Joe Pass until after he was arrested and out on bail.

Witness' address in New York City was general delivery, to which address by witness' direction, mail from his own family was sent. Witness' mail and

Morris' mail even from members of their own family was directed to General Delivery, New York City, as long as they stayed in New York. The first night in New York witness and his brother Morris stopped in a hotel. Then for the first week they went to some place on the West Side and resided there. After living a week on the West Side of New York they found quarters in Greenwich Village, 16 Christopher Street. He was arrested three or four weeks after his arrival.

Witness further on cross-examination stated that he attended a meeting of the American Union Against Militarism at the Good Eats Cafeteria quite a while before the meeting on Friday night, May 4th. This meeting on May 4th was the only one which the witness attended. He was not present at the meeting in the Epler Block, when the matter of distribution was considered. According to his recollection, there were thirty-five or forty people present at the May 4th meeting. Someone read the typewritten draft of the circular at the meeting. He did not know who read it, nor who was the author of it, nor who stood sponsor for it. According to him, it seemed that a committe had been appointed at a previous meeting for this purpose and that this committee on the night of the May 4th meeting was asked to report, which they did, with the leaflet in question.

He heard the entire draft of the circular read as he recalled. He was, however, engaged in talking to a woman sitting at the table beside him and did not pay very close attention to the reading.

Asked if he knew that it was the purpose of the meeting to plan on the distribution of the circular, he replied there was nothing spoken about it, although he presumed they were prepared to circulate, or rather, distribute, the circulars.

Witness is not a citizen of the United States, although he had resided within the United States for some fourteen years. Witness had never declared his intention to become a citizen of the United States. He was asked by someone what he thought of the circular. He told the person that he thought the language very rash and it did not appeal to him as a literary critic.

Asked as to his ability to indulge in literary criticism, he stated that he had attended the public schools in Cleveland, Ohio; taken a preparatory course under the Y. M. C. A. Auspices, which was equivalent to a high school course; had attended some special course in Columbia University.

Witness criticized the language and the expressions used.

Witness made the following answers to the following questions:

"Q. Did it strike you at that time peculiar

that the leaflet was calling for armed resistance to the government of the United States?

A. Now, under the psychological effect that I was at that time, knowing the people that were present there, which were, by the way, quite a few church people and middle class——

Q. Why won't you tell us who they were?

A. Because I don't know their names. I know the type; the are Dr. Strong's type. If I would see him I would know he was a minister.

Q. Did you tell the meeting at that time as a literary critic that the meaning of the words that they were putting into this circular meant armed resistance to the government of the United States?

A. I didn't go into the full details.

Q. You didn't think it of enough importance?

A. I wasn't a member of the organization. Not being a member, I didn't think it proper to butt in."

Asked as to why he did not press his objections more forcibly, witness replied that he was not a member of the organization and did not feel that he should take it upon himself to "butt in"—as he expressed it. He left about nine o'clock in the evening to meet the young lady with whom he was keeping company and whom he married on May 31st.

When he left the matter of distribution or printing had not been arranged for. He heard only

the discussion concerning the circular. He did not recall whether the money was collected for printing and distribution at this time or not. He did not contribute, even if the subject was under discussion, which he could not recall.

Asked as to whether his brother, Morris, assisted in taking up a collection, witness could not say.

He raised no protest against the distribution of the circular, for the matter of distribution was not discussed while he was there.

Asked as to why he did not protest against the proceedings, he replied that he was not a member and did not feel that he should take part in the deliberation of the members present.

If witness had considered what was taking place was wrong he probably would have said something by way of protest, but not with enough 'ginger.' Witness didn't think any crime was being committed.

Defendant, SAM SADLER, was next called as a witness on behalf of the defendant. He replied that he had known Mr. Wells about nine years and had known the Pass brothers for one and a half years. He had resided in Seattle during his acquaintance with Mr Wells. He was a machinist by trade and had been connected with the Labor Union and Socialist party movement for a long time. He was never a member of the American League Against Militar-

ism; was never in sympathy with it and never affiliated with a pacifist movement at all. He had no connection with the No-Conscription League; and the only two organizations which he was ever connected with were the Socialist party and the American Federation of Labor. He stated that he was not present at the meeting at the Good Eats Cafeteria when the circular (Plaintiff's Exhibit 6) was brought out for discussion. He admitted that he was present at the meeting in the Epler Block on May 11th. There were two or three meetings in progress on this occasion. As a delegate of the Longshoremen's Union he went up to the Labor Temple on Wednesday night when a communication was read by the secretary of the Socialist party, asking that delegates be sent to attend the meeting in the Epler Block on Friday night to arrange for a protest meeting or a parade to deal with the high cost of living.

Two or three others were selected with this witness, among whom were Friermood and Welty.

Arriving at the hall, he found the meeting in progress. He had nothing to do with the pamphlet or circular referred to as Plaintiff's Exhibit 6. Did not take charge of them. Had nothing to do with the collection of money for the purpose of printing them. Did not handle the money and had nothing to do with the matter at all. He did not contribute

any money for this purpose. His attention was first called to the circulars by the articles appearing in the newspapers and then saw the circular in question. The circular had at that time been distributed, for a printed extract from it was published in the P.-I. He also saw a copy of it in the Labor Temple on Wednesday following its distribution on Sunday. It was handed to him and he was asked if he had read it. He heard they had been distributed broadcast through the city, but did not get any of them.

At the meeting in the Epler Block there was a general discussion about holding a parade and getting out printed matter to advertise a big meeting somewhere. Several organizations had sent delegates. While witness was at the meeting in the Epler Block there was no discussion by anyone in reference to the No Conscription circulars. There was no talk about opposition to the Government or any of law of the Government.

Witness had nothing to do with the No-Conscription League or its propaganda.

ON CROSS-EXAMINATION by Mr. Reames he replied that he had been married to his present wife ten years; that she was a Socialist worker, frequently speaking for the Socialist party and organized labor. He didn't know whether she ever spoke against militarism. He never attended any

of her meetings, except some Socialist meetings. He never attended her in going from place to place, except he was with her on one trip to Los Angeles.

He attended a meeting in the Epler Block on the Friday preceding the distribution of the No-Conscription circulars on Sunday morning. Messrs. Wells, Friermood, Welty, Rankin and David Levine were there. He could not recall the names of any other persons present. There were committees from several organizations present. There was no sergeant-at-arms at the door. The meeting was not polled and no one was vouched for. It was an open meeting at which anyone could attend. There was no suggestion made that there was any danger of the meeting being broken up by either the authorities or anybody else. Witness arrived about eight-thirty o'clock. Stayed about an hour. It was held in the headquarters of the Socialist party in the Epler Block.

There were two rooms in one with an archway. A person sitting in one room can only see on an angle on the other side of the room. The Socialists had no other headquarters in that building. If they had witness would have known it. He carried a key to the headquarters.

Witness was asked if he was present at the time the resolution was adopted on May 23rd at the Labor Temple, replied he must have been there, but could

not recall clearly about the meeting. It was a public meeting and he could not tell whether a roll call was had or not. He just happened to be in there. His attention was called to an alleged statement that Wells had made to the effect that Sadler had made a talk relative to the distribution of the circulars. He replied that he did not remember Wells' testimony, but that if Wells did make that testimony it was not true. There was nothing said at the Labor Temple meeting of May 23rd to oppose the law. He had advised young men to register under the Draft Act. These two young men were Clarence L. Parks and George Zimmerman. He advised both of these persons about complying with the Draft Act before it had even passed.

Next witness in behalf of the defendant is CLARENCE L. PARKS, who stated that he had known Sam Sadler for eight years and that Sadler advised him to register. This was before the act became a law.

On CROSS-EXAMINATION, witness remembered that he made inquiry of Sadler about the proposed law. There had been a discussion. Witness thought Sadler might know, so he went to Sadler and asked the latter's advice whether witness should register in the event it became a law.

Witness claimed exemption under his questionnaire upon the ground that he had a dependent family.

Conversation with Sam Sadler occurred before the law passed. There were other people standing around who heard the advice.

DAVID LEVINE was next called on behalf of the defendant. Testified that he had known Morris and Joe Pass all his life. He was born in the same city where they were. He knew about their intention to leave some eight months before they left Seattle. Was always talking about going to New York. Joe intended to study literature there. He knew they were about to leave somewhere about the first of June, but did not know the exact date.

Mr. Reames called his attention to a letter which he wrote under date of November 1, 1917, to Morris and Joe Pass at New York City. He admitted signing and sending the letter to them, which letter showed him to be upon terms of familiarity with them and interested in arranging bail for them and looking after their welfare.

HELEN BARR PASS was next offered on behalf of the defendants. She testified that she was the wife of Joe Pass, having married him on May 31, 1917. Her husband leaving the same day for New York City. There was parental objection on both sides to witness' marriage to Joe Pass and it was kept secret. She knew that Joe had been planning to leave for New York for a long time, for a year at least. There was no secrecy about his purpose of leaving Seattle.

LEWIS BERG was next called as witness for defendants. Testified that he was a manufacturing jeweler in the City of Seattle and knew Morris and Joe Pass. Had been acquainted with them since early in the spring of 1917. He knew of the intention of these defendants to leave Seattle for New York some seven or eight months before they left. They made no secret about their purpose to leave Seattle. Morris intended to study art and Joe intended to go there for some literary work. Morris told him that in traveling he was frequently in the habit of using the name of Levine. Witness did not know of Joe's intention to use the name Levine. This witness did not write the Pass boys at their general delivery address in New York. He learned their address through David Levine.

NESTA WELLS was next called for the defendants. She testified that she was the wife of defendant, Hulet M. Wells. Had been married nearly ten years. She attended two meetings of the No-Conscription League. The first about April 30th and the second on May 4th. On April 30th there were about twenty-eight or thirty people present. The sexes were about evenly divided. She went to the first meeting so that she could meet her husband, whom she knew would be there. Nothing was said about the use of force to oppose the laws or authority of the United States. She said these people were

not an impulsive kind of people, but were calm, thoughtful and intelligent, and seemed to have a conscientious desire and longing for peace.

The proposed Draft Law was being discussed and the meeting was for the purpose of showing the people in Washington that they were fighting against it. There was no suggestion made by Wells to use force in the opposition of the enactment. Asked if defendant Sadler was there, witness did not think so. The first time she saw Joe and Morris Pass was at the next meeting. Witness remembered that Mr. Duncan was there, because he went out with her husband, and she thought Miss Strong was there also.

She said that she did not remember whether any vote on the subject of this literature was taken or not, but that she did not vote if in fact a vote took place.

It was decided to circularize the city and the committee was selected to draft a pamphlet that would be sent out and distributed at the homes. The matter of holding meetings and parades was discussed. They decided they would not reach as many people, not so easy to handle, and would take more money.

The next meeting was on May 4th at the Good Eats Cafeteria. This was also an open meeting. Witness went there to meet her husband, Mr. Wells.

She arrived at the close of the meeting, just in time to meet her husband, and she was not familiar with what occurred. She remembered that the two Pass boys were there, as was also Miss Strong. Nothing was said at this meeting by Mr. Wells about forcibly opposing the laws of the United States. She had never heard her husband counsel using force or anything of that kind against the authority of the United States. He believed, on the other hand, that the laws should be written after political thought and action, and Congress should be appealed to, in the matter of its proposed law. On cross examination witness said that Mr. Wells' attitude had always been towards the enforcement of the law as written except as he could have it modified. Witness did not know specifically whether Mr. Wells was in accord with the principles of the Socialist Party relative to its war program. She did not know whether he was in accord with the specific declaration of the National Socialist Platform in which it says the declaration of war on the part of the government is a crime. She had never read the war platform of the Socialist party. Witness had never heard her husband say that the present war of the United States against the Imperial German Government is a crime."

Witness on cross-examination identified her husband's signature. She knew that he wrote the

resolution introduced in the Labor Temple on May 23rd. Witness testified in response to question as follows:

"Q. Does the statement in this which was introduced after the war was declared, that refers in express language to the war being fought in an unworthy cause, are those his sentiments?

A. I know that he wrote that resolution, and he read it to me. I can't vouch for that being in there.

Q. You admit those represent his true sentiments?

A. I think they do, if that is in there."

At the April 30th meeting a collection was taken up to defray the expenses of getting out the circular to oppose the passage of the Conscription Act. As to whether a committee was appointed she could not say. She did not know who wrote the circular, only that her husband did not write it. She could not say whether the circular was read before she arrived, but supposed that it had been because Mr. Wells took it home with him.

"Witness testified as follows:

"Q. Did you stay there throughout the entire meeting?

A. It was not a very long meeting. I know we left before eight o'clock. I just went there and ate supper and stayed a little while.

Q. Did some person after you arrived read a draft of this circular?

A. Not that I know of.

Q. It has been testified to by a number of witnesses—

A. I told you that I went late.

Q. You went late?

A. Yes, I met Miss Strong as she was coming out."

Everybody was talking about the circular during the time that she was there. She was there when her husband took the circular from the table. She could not tell who had charge of it before he took it.

It was not a formal meeting, where you have presiding officers, but was simply an informal discussion following dinner at the cafeteria. The circular was upon a table upon which the dinnner had been served.

Asked by Mr. Reames as to how long the circular lay upon the table before her husband picked it up, witness replied that her husband was late, had just come in; that was then ready for printing.

Her husband picked up the manuscript, read it over, criticised the form of it in a discussion in which others joined, and then took it away with him. Joe and Morris Pass were recalled for further cross-examination by Mr. Reames to ask how soon after

reaching New York were they arrested. They replied about three or four weeks.

Joe Pass was asked whether questions and answers were put to him and answered in New York City in a secret service office, that were not brought out in the transcript. Joe Pass replied that there was one question that he was distinctly asked half a dozen times, to-wit: Whether he was present in the Epler Block when distribution took place. He told them no, and that this question was not contained in the trancsript; that the secret service officers had cut it out.

Here the defense rested.

This was substantially all the evidence offered by the defense in support of their case in chief.

Plaintiff then offered Frank B. Greene, who testified that the statement made by witness Joe Pass that something had been taken out by the secret service operatives in New York was false. Witness at the time of the examination of defendants Morris and Joe Pass in New York, had prepared and at the time of this trial had here a full and accurate statement of what said defendants had stated on said examination. Witness had put nothing into said statement that did not happen and had left out nothing that did happen.

This witness then said that Morris Pass said in New York that he was present when the circulars

were divided up for distribution and volunteers came to the table and took them from time to time from the table. Wells was there in the earlier part of the distribution. Morris Pass took some of them and circulated them, Morris Pass did not recollect how many he had circulated. He had not left any in doorways or halls, or like that, but had just handed them to his friends. He had had about a dozen or two dozen of those circulars.

Mr. Bell, on cross-examination, asked this question: "Morris Pass was interrogated with reference to the Epler Building meeting."

Mr. Greene replied as follows:

"If it is in the testimony; yes."

"Q. Haven't you any recollection of it?"

"A. No.

"Q. None whatever?

I would like to examine this testimony. (Examining counsel looked at transcript.)

A. I may add that the Epler Block was not referred to by name."

"Q. In your presence a number of questions were asked Morris Pass in reference to the meeting in the Socialist Hall where the circulars referred to were distributed—that is a fact, isn't it?

A. Where the circulars were distributed, yes sir.

Q. You did identify that meeting by the meet-

ing where the circulars were distributed, didn't you?

A. Yes, sir.

Q. He was asked a number of questions with reference to that meeting?

A. Yes, sir.

Q. Why wasn't Joe Pass? Where are they?

A. I don't know, Mr. Bell; I didn't do the questioning.

Q. Don't you know why he was not interrogated on that subject?

A. He was questioned about the circulation, Mr. Bell.

Q. Yes; but not a question with reference to his attendance or non-attendance at that meeting is shown in that transcript—that is a fact, isn't it?

A. If I may look over it (counsel hands transcript to witness).

THE COURT: Anything further?

MR. BELL: Yes, I am waiting for the witness to answer the question.

Q. There is nothing shown there?

A. I can't find any.

Q. If Joe Pass was asked whether or not he attended that meeting, it does not show in your notes?

A. No sir, I can't find it in here.

Q. And will you tell this jury why it was when these boys—when these defendants Joe Pass and Morris Pass were being cross-examined by those de-

tectives, Joe Pass was not asked whether he attended the meeting in the Socialist Hall?

A. I don't know, sir.

Q. Isn't that what they were trying to find out?

A. I don't know. I was merely the stenographer at that meeting and not the questioner."

At this point Mr. Reames offered the transcript as testimony containing the questions propounded to the defendant Joe Pass in the office of the U. S. secret service, together with his answers.

Mr. Bell objected on the ground that the witness should testify from his recollection and from that only, stating that he could have recourse to notes made at the time for one purpose, only, viz., that of refreshing his memory, and that the witness could not make his own notes and then introduce them.

Mr. Bell argued that the question asked of the witness by Mr. Bell was whether his notes indicated any question propounded defendant Joe Pass upo the very matter which he was brought from New York for examination, and that the witness stated that they did not.

Mr. Bell then said his purpose was to show that this particular question was not asked of Joe Pass or that if said questions were asked they were eliminated from the transcript.

Thereupon, the court overruled Mr. Bell's objection and admitted in evidence the entire transcript of the testimony of Joe Pass in his examination in New York City, which witness testified contained the full, true and correct statement of all questions propounded to and answers made by him in the office of the secret service of the U. S. in New York City as Plaintiff's Exhibit Eleven.

The court, on the admission of said transcript in evidence said:

"The rule contended for by the defense is the one that has been adhered to by the court and is unquestionably the law. In my judgment, however, that has no application here. Here is a charge made that a part of the record has been suppressed, or that the witness upon the stand is falsifying the record, or is falsifying the record and permitted to do that, perhaps, by his superiors. This now raises an issue of itself. The Government contends that the record as disclosed is a full, true and complete record, not only of what did transpire, but likewise covers the field concerning which the inquiry was made. So upon that the record would speak for itself. And this is the issue that the jury must determine in weighing the testimony and credibility of the witness. Upon the objection made, and that is the only one, the court can consider I think the record should be admitted and an exception noted. This is simply the transcript with relation to Joe Pass."

Thereupon Mr. Bell, for the defense, took an exception which exception was allowed.

Mr. Bell further offered to cross-examine witness concerning the transcript, which had then been offered in evidence, stating particularly that Joe Pass had been asked on the witness stand, while testifying for the defendants, whether or not he had been interrogated in New York City as to the meeting which had been identified as held at the Good Eats Cafeteria. Witness replied, "I believe so, if the statement shows it."

The court then observed:

"THE COURT: Let me make this observation: If the witness is merely to be interrogated as to the contents of that record and the various phases of the inqury, isn't that a matter of argument to be presented to the jury rather than of testimony?

MR. BELL: I had supposed that entire matter would be; but now that the transcript is in evidence, I want to cross examine, if I may, upon its contents.

THE COURT: The only purpose for which that could be admitted, as I stated, would be to show the scope of the examination and whether the record discloses the scope contended for by the Government or the charge made by the defendants; and if there are any disclosures in the record that are foreign to this issue, why, those, of course, would not be considered by the jury in determining the facts in this

case other than as it may bear upon the credibility of the testimony of this witnesse as to disclosures made by the witness heretofore.

MR. BELL: Your Honor will recall that Joe Pass was asked on the witness stand a few moments ago, whether or not he had been interrogated with reference to the second meeting—the meeting at which the circular had been distributed. He said that he had been interrogated with reference to that meeting, that a number of questions were put to him and answers given by him. I then asked this witness whether the transcript showed any such questions or answers, and he said that it did not. That, I take it, should have settled the matter because this evidence would show nothing.

THE COURT: I simply made that inquiry. If that is the only purpose, that would be a matter of argument rather than of testimony. If there is any other purpose I don't know what it is.

MR. BELL: I simply wanted to bring out that this transcript made by this witness shows that Joe Pass was interrogated at New York in reference to the meeting at the Good Eats Cafeteria, but fails to show that he was interrogated with reference to the meeting where the circulars were divided up for distribution.

THE COURT: You can point that out to the jury, as well as the witness can.

MR. BELL: I offer to show by this witness that at this meeting, Joe Pass was interrogated at New York in regard to the first meeting held in reference to the circular, but that this record fails to show that he was interrogated with reference to the second meeting where the circulars were brought and distributed.

THE COURT: The transcript would speak for itself. It would show what is in the record and what is not in the record.

Mr. Bell then took an exception to the Court's rejection of his offer.

Thereupon Mr. Bell moved for a directed verdict of not guilty for all of the defendants. In reply the court remarked:

"Let the record show a motion for directed verdict for all the defendants is denied and exception allowed.

Thereupon, both sides rested.

This was substantially all the evidence offered by the parties.

Within the time limited by the rule of the court for the presentation of requests for instructions and in the presence of the jury the defendant requested the court to give to the jury as instructions all of the instructions that had been theretofore requested by the defense at a former trial in case No. 3671, entitled "The United States of America vs. Hulet M.

Wells, R. E. Rice, Sam Sadler and Aaron Fislerman," in so far as such requested instructions should be applicable to the present case, considering the difference in the indictments, and it was agreed between the Government, the defense and the court that such request should be deemed and taken by all as a sufficient request for the giving of said instructions.

The following are the instructions requested by the defense in said case No. 3671 and referred to above, to-wit:

"United States District Court, etc., No. 3671.

INSTRUCTIONS REQUESTED BY DEFENDANTS

INSTRUCTION NO. 1.

I instruct you to find the defendant, Hulet M. Wells, not guilty.

INSTRUCTION NO. 2.

I instruct you to find the defendant, R. E. Rice, not guilty.

INSTRUCTION NO. 3.

I instruct you to find the defendant, Sam Sadler, not guilty.

INSTRUCTION NO. 4.

I instruct you to find the defendant, Aaron Fislerman, not guilty.

INSTRUCTION NO. 5.

I instruct you to find the defendants not guilty under Count 1 of this indictment.

INSTRUCTION NO. 6.

I instruct you to find the defendants not guilty under Count III of this indictment.

INSTRUCTION NO. 7.

I instruct you to find the defendants not guilty under Count V of this indictment.

INSTRUCTION NO. 8.

The first element of the crime of conspiracy, namely, the conspiring together, confederating together or agreement together is one of the essentials of the crime. By this is meant an intelligent, mutual agreement or understanding to co-operate for the purpose of carrying out some pre-conceived plan. There must be a preconceived plan. There must be some agreement to co-operate, there must be some meeting of the minds of the conspirators. Each of the conspirators must know that the other conspirator is going to do something to accomplish the end of the conspiracy. Mere knowledge that another or others are about to commit or about to attempt a crime, will not make one a conspirator. The mere haphazard doing of acts by persons acting independently does not constitute a conspiracy even though the acts done may tend to one end and even though each person may know of the other's act.

INSTRUCTION NO. 9

I instruct you that the first count of the indictment in this case charges that the defendants con-

spired in violation of the provisions of Section 37 of the Penal Code of the United States to violate the provisions of Section 211 of the Penal Code of the United States as amended by Section 2 of the Act of March 4th, 1911. Section 37 referred to provides that whenever two or more persons shall conspire * * * to commit an offense against the United States and one or more of said persons shall do any act to accomplish the purpose of said conspiracy shall be guilty, etc.

Count 1 of the indictment, in so far as it is material for your consideration, charges that on the 1st day of May, 1917, the defendants did conspire to print and distribute throughout the City of Seattle, a certain printed publication referred to as a "No Conscription" circular with the intention that the persons receiving the same should knowingly deposit and cause the same to be deposited for mailing, and knowingly take and cause the same to be taken from the United States mails, and it is alleged that said "No Conscription" circular was of a character that would incite arson, murder and assassination.

In a word this count of the indictment charges a conspiracy to use the mails in violation of the statutes I have heretofore quoted, prohibiting the mailing or receiving of certain non-mailable matter. The entire jurisdiction of the United States Government and of this court depends upon the question whether

in planning to circulate or distribute the pamphlet in question, the defendants intended that the mails should the employed. If you have a reasonable doubt upon this point, as I shall hereafter define the term, I instruct you that you must find the defendants not guilty on count one, notwithstanding you may believe they planned to circulate and distribute the pamphlet in question by other means.

INSTRUCTION NO. 10.

I instruct you that Count 1 of the indictment charges that the defendants conspired to cause other persons to deposit in the mails and take from the mails, a certain circular which has been designated as the "No Conscription" circular. This is the issue upon which must be determined the question of the defendants' guilt, or innocence. In determining this issue you will not consider at all the question whether it was contemplated or planned that certain other letters, books, pamphlets or papers should be so deposited in or received from the mails. There is no sufficient charge in the indictment that any other letters, books, pamphlets or papers of an indecent character were to be deposited or taken from the mails, neither is there any evidence of such a plan, and so I want to caution you particularly that you will not even consider whether such a plan existed, and unless you find from the evidence in the case beyond a reasonable doubt that the defendants or

some of them planned and intended that this particular circular should be deposited in or taken from the mail, you will find the defendants not guilty.

INSTRUCTION NO. 11.

I instruct you that Article I of the Amendments to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances." That one of the inalienable rights of every American citizen which even the Congress of the United States is powerless to abridge is the right to peaceably assemble and petition Congress or individual representatives in Congress upon any matter of legislation whether the same be still pending and under consideration by that body, or whether the same shall have been finally passed and enacted into law, and whether the purpose of the petition be to defeat the passage of such act or to secure its amendment or repeal, and under no circumstances can the exercise of this right in good faith be considered criminal or even unlawful. It is likewise the inalienable right and privilege of all persons whether they act singly or collectively, to speak and write freely upon all questions of public importance and in so doing they are fully protected

by the provisions of the Constitution I have just quoted, so far as you are concerned with the question in this case, so long as they do not advocate, advise or encourage the use of force in hindering, opposing or delaying the exercise of some existing law of the United States, or do not advocate, advise or encourage forcible opposition to the authority of the United States under such existing law.

It is extremely important that throughout all your deliberations in this case you should bear this point clearly in your minds. It is the policy of our law to permit at all times, and in all places, and under all circumstances the free discussion of all public questions, providing only that such discussion does not partake of the nature of advice or encouragement to resist existing law or existing authority, and neither the pendency of war nor any consideration of public necessity or patriotic duty can in any manner curtail or abridge this right of free discussion and free assemblage.

INSTRUCTION NO. 12.

I instruct you that the introduction on the 23rd day of May, 1917, before the Central Labor Council of the City of Seattle of the resolution which is set out in the indictment in this case was an ordinary exercise of the right of free speech and peaceable assemblage guaranteed to every person by the Constitution of the United States, and that you will not

consider the same as in any sense unlawful or treat it as an overt act committed in pursuance of any unlawful conspiracy.

INSTRUCTION NO. 13.

I instruct you that the preparation and distribution of the "No Conscription" circular referred to in the indictment herein occurring prior to the final passage of the Conscription or Selective Service Act of May 18, 1917, was not a violation of that act, nor did the preparation and distribution of said circular amount to a conspiracy to violate said act or to forcibly hinder, delay or oppose its execution because all of said acts preceded the passage of the act in question and as a matter of law a man cannot be guilty of conspiring to violate an act of Congress until after the same has been passed and approved and become a law.

INSTRUCTION NO. 14.

I instruct you that you will find the defendants not guilty under Count V of this indictment unless you find from the evidence in this case and beyond a reasonable doubt that after the 18th day of May, 1917, some two or more of said defendants conspired, confederated and agreed to induce others by force to hinder, delay and oppose the execution of the so-called "Conscription" or Selective Service Act.

INSTRUCTION NO. 15.

I instruct you that prior to the 18th day of May, 1917, neither the President of the United States nor any other person or body had any authority to call into the service of the United States or to organize the unorganized militia of the United States. The authority to organize and call such militia into service is vested by the Constitution of the United States solely in Congress and until the 18th day of May, 1917, Congress had not exercised such authority. Prior to that date the only military forces which the President or any other officer of the United States had authority to call into service or to organize or direct in any manner were the regular naval forces, the regular army and the National Guard, and unless you believe from the evidence in this case beyond a reasonable doubt that it was the purpose of the defendants or of some one of the defendants acting in collusion and conspiracy with some other persons unknown, to forcibly oppose the authority of the Government in organizing and directing the regular naval forces, the regular army or the National Guard, you will find all the defendants not guilty under Count III of the indictment.

INSTRUCTION NO. 16.

You will observe that in Count III of the indictment and more particularly on page 15, it is charged that the defendants conspired by force to oppose the

authority of the United States and of the President of the United States in carrying into effect the provisions of the laws then existing relating to the armed military and naval forces, and such other laws as might thereafter be enacted in pursuance of the joint resolution of Congress declaring war. In this connection I wish to caution you that you cannot consider whether it was the purpose of the defendants or any of them, to prevent, hinder and delay the execution of any law that had not yet been enacted, or to oppose the authority of the Government or of the President under any law not yet enacted, for the reason that I have already explained, that a man cannot be guilty of a conspiracy to violate or obstruct or oppose laws which have not yet been enacted, nor can be guilty of conspiring to oppose authority which has not yet been conferred; and so in determining the question of the defendants' guilt or innocence you must ignore entirely any statute, whether pending in Congress or not, which had not been finally enacted into law at the time the conspiracy is charged to have existed. More specifically, unless you find that a conspiracy existed between two or more of these defendants after the 18th day of May, you will entirely disregard and eliminate from your consideration in this case the Conscription or Selective Service Law, and you will not even consider the question whether the defendants or any of them, de-

signed and intended to interfere with the operation and execution of such law.

INSTRUCTION NO. 17.

I instruct you that the Constitution and laws of the United States provide for two distinct kinds of military forces· The first is the regular paid, or professional soldier, such as is found in our regular standing naval and military forces; the second is known as the militia, which comprises the National Guard and all other male citizens between the ages of 18 and 45, which are unorganized and known as the unorganized militia.

The Constitution of the United States provides that the militia, whether organized or unorganized, may be called forth by Congress only for the three following purposes: First, to execute the laws of the Union; second, to repress insurrection; and, third, to repel invasions. The law makes no provision for calling forth the militia, whether organized or unorganized in a foreign war, and if it was the purpose of the so-called Conscription or Selective Service Act of May 18th to provide a body of troops for service in a foreign war and outside of the United States, then such law was unconstitutional and void. A void law is no law and is not entitled to either respect or obedience, and no person can be guilty of violating such a law or conspiring to violate the same.

INSTRUCTION NO. 18.

I instruct you that unless you find beyond a reasonable doubt that some two or more of the defendants after the 18th day of May, 1917, conspired to prevent, hinder and delay by force the execution of the Selective Service Act, or conspired to oppose by force the authority of the United States under that law, you will find the defendants not guilty on all the counts of this indictment.

INSTRUCTION NO. 19.

Every person accused of crime is presumed in law to be innocent of the crime charged until his guilt is proven by competent evidence to the satisfaction of the jury and beyond all reasonable doubt. This presumption is not a mere fiction which a jury may lightly disregard, but is a substantial right accorded by law to protect the innocent from unjust and unfounded accusations. It accompanies the defendant throughout the trial of the entire case. It follows therefore that you have no right to draw any inference of guilt from the fact that the grand jury has returned an indictment against these defendants, nor will you form your opinions of guilt or innocence as the evidence is being introduced during the trial, or until all of the evidence has been presented on both sides, and until you have been instructed by the court upon the law of the case, and

you have finally retired to your jury room to deliberate upon your verdict.

INSTRUCTION NO. 20.

As I have already instructed you, the defendants in this case are presumed to be innocent until the contrary has been shown to your satisfaction beyond a reasonable doubt. It is not incumbent upon the defendants to prove their innocence. The burden rests upon the Government to prove their guilt. This burden never shifts to the defendant, and unless the Government has satisfactorily met this requirement as to each defendant, the jury will acquit such defendant.

INSTRUCTION NO. 21·

I instruct you that in a criminal action you cannot base conviction upon mere probabilities, but before you can find any defendant guilty you must be satisfied of guilt beyond all reasonable doubt.

INSTRUCTION NO. 22.

In a criminal case it is not sufficient that the Government should prove its case by mere preponderance of the evidence, nor is it necessary, on the other hand, that it should prove its case positively and beyond all doubt. The law requires, however, that the Government should prove every material issue to your satisfaction and beyond all reasonable doubt. The expression "reasonable doubt" means in

law just what the words ordinarily imply. To be reasonable, a doubt must be founded upon reason. In deliberating upon the evidence in this case you should not search for reasons for conviction, neither should you look for reasons for an acquittal. You will confine your deliberations solely to the evidence that has been admitted for your consideration. This evidence you will consider in the light of the instructions given you by the court. Ignoring all other things and disregarding all prejudices you should attempt fairly, conscientiously and honestly to ascertain the truth about the matters alleged in this indictment and if at the end of your deliberations you have a reasonable doubt concerning any of the material matters alleged in the indictment, it will be your duty to acquit the defendants.

INSTRUCTION NO. 23.

Evidence is either direct and positive, or presumptive and circumstantial. When a witness testifies directly to the facts constituting the crime the evidence is said to be direct and positive. When he testifies to facts and circumstances having only an indirect relation to the facts constituting the crime, the evidence is presumptive and circumstantial. The commission of a crime may be proven either by the direct testimony of eye witnesses, or by circumstantial evidence; but when circumstantial evidence is relied on for a conviction, the circumstances should

be consistent with each other. They must all be consistent with the defendant's guilt; and they must be inconsistent with any reasonable theory of the defendant's innocence. Evidence purely circumstantial in character which does not exclude every reasonable and rational theory of the defendant's innocence cannot, as a matter of law, be convincing beyond a reasonable doubt.

INSTRUCTION NO· 24.

Evidence has been received of the good reputation of the defendants for peace and quietude and as law-abiding citizens. You should consider such evidence, together with all of the other evidence in the case, in arriving at your verdict; and if from such evidence you have a reasonable doubt concerning the defendants' guilt you should acquit.

INSTRUCTION NO. 25.

I instruct you that when you retire to consider your verdict in this case you must consider separately the evidence against each defendant and consider separately the question whether each defendant is guilty or innocent, and if you have a reasonable doubt about the guilt or innocence of any defendant, it will be your duty to find such defendant not guilty.

INSTRUCTION NO. 26.

I instruct you that you are the sole and exclusive judges of the facts of this case and of the credibility

of the witnesses who appear before you. If, in the course of the trial, in ruling upon objections to evidence or upon motions made by counsel, the court may seem to you to have expressed an opinion upon any fact in this case, you will entirely disregard such matter. The court as such has no opinions about the facts and has not intended to express any. In determining the amount of credit which you will give to the testimony of the various witnesses who have appeared before you, you will consider their demeanor upon the witness stand; their apparent candor and fairness, or lack of it; the opportunities which they may have had for knowing the facts concerning which they have testified. You will be slow to believe that any witness has deliberately testified falsely, but if you do so believe, it will be your duty to entirely disregard the testimony of such witness, except in so far as the same may be corroborated by other credible evidence in the case.

INSTRUCTION NO. 27.

You will disregard entirely the fact that the defendants have made a motion for a directed verdict in their favor. In ruling upon this motion the court has not even considered whether the defendants, or any of them, were guilty or innocent. Again, I want to caution you that the court has no view upon this question and has not expressed any view in passing

upon this motion. It is the court's province to pass upon, and instruct you regarding the law in the case; and it is your province to decide the facts.

INSTRUCTION NO. 28.

In arriving at your verdict, you should consider separately the question of the guilt or innocence of each of the defendants charged; and if you have a reasonable doubt as to the guilt of one of the defendants, it is your duty to return a verdict of not guilty as to such defendant.

Except as the same be incorporated in the general charge of the court to the jury, the court refused to give any of said requested instructions to the jury, and to each separate refusal the defense asked and was allowed a separate exception.

EXPLANATORY NOTE.

In cause No. 3671 there were four defendants, to-wit: Hulet M. Wells, Sam Sadler, R. E. Rice and Aaron Fislerman. The indictment therein contained five counts charging said defendants with the commission of offenses as follows: Count 1, conspiracy to violate Section 211, Penal Code; Count II, conspiracy to violate Section 211, Penal Code; Count III, a violation of Section 6, Penal Code, by conspiring to prevent, hinder and delay the execution of the joint resolution of Congress approved April 6, 1917, declaring a state of war to exist, and the laws re-

lating to the armed forces of the United States an appropriate for executing the said declaration of war, and to oppose by force the authority of the President in executing said law; Count IV, charged seditious conspiracy under Section 6, Penal Code, substantially the same as the charge set forth in Count III; Count V, charged seditious conspiracy under Section 6, Penal Code, to prevent, hinder and delay the execution of the Selective Service Law approved May 18, 1917. By appropriate proceedings and action counts one, two and five were withdrawn from the consideration of the jury and the case was submitted to the jury upon one count, to-wit: Count III. A verdict of "not guilty" was rendered as to the defendants R. E. Rice and Aaron Fislerman. The jury disagreed as to defendants Hulet M. Wells and Sam Sadler.

The indictment in cause No. 3797 is in two counts, and sets forth substantially the charge embodied in Count III of the indictment in cause No. 3671. The transactions involved and the overt acts charged are substantially the same in cause No. 3671 and in cause No. 3797. In the last named case were included two other defendants, Morris Pass and Joseph Pass, who had not been defendants in cause No. 3671.

After the arguments of counsel, the court charged the jury as follows:

"By NETERER, Judge:

GENTLEMEN OF THE JURY: The issue to be determined in this case is one of great importance to the Government and to the defendants, and requires your careful consideration. Each party in this case has examined you with relation to prejudice, preconceived notions, of this issue, and you have convinced both sides that you are free from any prejudice and can determine this issue solely upon the evidence which has been presented, and both sides have a right to rely upon this conception of your qualifications; and I have no doubt that you will eliminate from your minds every element which would have a tendency to detract from the issue and will concentrate your thought alone upon the determination to do justice and right, as your quickened conscience, aroused by the serious duty before you, may dictate, your every thought and effort being divorced from passion, prejudice, sympathy, or sense of relation to things which might detract your thought from the real issue in this case, and that is the guilt of innocence of the defendants, and by a fair, honest and conscientious consideration conclude, so that the Government and the defendants may feel that fair and honest consideration has been given to the matter in hand.

You can readily understand that the Government can only be maintained by the enforcement of

the law. You, as jurors, are not concerned with the policy of the law. You are simply concerned with the facts as applicable to the law which has which has been passed by Congress. You appreciate that if the Congress, the law-making body, enacts a law defining a particular policy or rule of conduct, it believes it to be to the best interest and welfare of the country; and if people should decline to fairly and honestly live up to the law or discharge their duty by enforcing the law, that it would only be a short time until a condition of anarchy would obtain and no stable government could be maintained. On the other hand, you are instructed that the Government does not desire to have a jury conclude against a person on trial unless the conclusion is supported by the evidence. In other words, the Government does not desire to have an innocent man convicted. It is just as much interested in having an innocent man acquitted as it is in having a guilty man convicted; but it does not want a guilty man to escape when the testimony shows beyond a reasonable doubt that he is guilty. So jealous is the Government of the liberty of a party charged with an offense, and so interested in the innocence of parties, that the law surrounds every man charged with an offense with the presumption of innocence until he is proven guilty, and also places upon the Government the burden of proving a party guilty beyond every reasonable doubt.

The gist of the offense charged is a conspiracy entered into on or about April 25, 1917, by force to prevent, hinder, or delay the execution of the law of the United States.

A conspiracy is defined as a combination or confederation of two or more persons, by concerted action, to do an unlawful thing, or to do lawful thing in an unlawful manner; and the indictment charges the doing of overt acts in furtherance of the conspiracy, or some act for the purpose of carrying out the conspiracy. In other words, if you should find a conspiracy was entered into as charged, and that some one of the defendants or some persons unknown, disclosed by the evidence, who entered into the consipracy, did some overt act in furtherance of it, then all of the defendants who entered into the conspiracy or became party to the conspiracy after it was formed, would be guilty. To make the statute clearer if possible, I will state the three essential elements: First, the conspiring together of two or more persons, that is the element of intelligent, mutual agreement or understanding to cooperate for the purpose of carrying out some preconceived plan; second, to commit the offense charged, which in this case is to prevent, hinder or delay the execution of the law of the United States as charged in the indictment; and, third, the doing of what is termed the overt act, or the element of

one or more of the defendants doing one or more of such acts to effectuate the objects of the conspiracy. The common design is the essence of the charge, and while it is necessary to establish the conspiracy to prove the combination of two or more persons to accomplish the unlawful purpose and that there was a confederation and agreement together and a preconceived plan, it is not necessary that two or more persons should meet together and enter into a written agreement or a definite verbal understanding or that they should formally in words or writing state what the unlawful scheme was to be or the general understanding or detail or plan or means by which the unlawful combination was to be effected or the part each was to play. It is sufficient if two or more persons in any manner positively or tacitly come to a mutual understanding to accomplish a common unlawful preconceived design or purpose, and if they proceed on such mutual understanding, each to participate in some manner, although in a very minor way, and proceed to carry out the preconceived plan, and the acts of the parties so dovetail and fit together that the conclusion is inevitable that there was an understanding between the parties as to the thing to be done and the statute to be violated, a conspiracy would be established. In other words, where an unlawful object is sought to be effected and two or more persons, actuated by

a common purpose and pursuing a preconceived plan to accomplish such purpose, should work together in any way in furtherance of the unlawful scheme, every such person participating is a party to the conspiracy, no matter what part he takes in the execution of the object and plan; and where several persons are proven to have combined together for the same illegal purpose, any act done by any one of the parties in furtherance of the original concerted plan and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and any declaration or statement made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proven, are as much responsible for such declaration and the acts to which it relates, as if made or done by themselves. You are further instructed that a party who comes into a conspiracy, as I have stated, after it is formed, with a full knowledge of the object and purposes, and aids in carrying out the original design, thereby adopts all of the acts done prior to that time, and is as much a member of the conspiracy as though he had entered it from the beginning.

The indictment in this case contains two counts, but only one offense is stated. These counts will be considered by the court as one offense or consolidated into one and so treated.

The particular charge is that the defendants conspired to oppose by force, and to prevent, hinder, and delay the execution of a joint resolution of Congress declaring a condition of war to exist between this country and the Imperial German Government, and the National Defense Act and other acts set out in the indictment.

You are instructed that on the 6th day of April, 1917, the Congress of the United States passed a resolution in which it was stated:

"That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared, and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government; and to bring the conflict to a sucessful termination, all the resources of the country are hereby pledged by the Congress of the United States."

Prior to the passage of this resolution, the Congress had likewise passed what is called the National Defense Act, of June 3, 1916, Section 57 of which provides that:

"The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or who shall have declared their intention to become citizens

of the United States, who shall be more than eighteen years of age, and, except as hereinafter provided, not more than 45 years of age, and said militia shall be divided into three classes, the national guard, the naval militia, and the unorganized militia."

And by the same act, by Section 79, it is provided that:

"If for any reason there shall not be enough voluntary enlistments to keep the reserve battalions at the prescribed strength, a sufficient number of unorganized militia may be drafted into the service of the United States to maintain such of the said battalions at the proper strength '.'

The law likewise makes it the duty of the President, whenever the United States is in danger of invasion from any foreign nation, to call forth such number of the militia as may be deemed necessary by the act of January 21, 1903, as amended May 27, 1908 (U. S. Compiled Stat., Vol 4, page 4296), to which I have just referred. To concisely state the law, then, on the 25th day of April, Congress had declared the existence of a condition of war and directed the President to employ the entire naval and military forces of the United States and the resources of the Government to carry on the war against the Imperial German Government. At this time the law provided for distinct military and naval

forces: First, the regular standing army and the military forces, and, second, the male citizens of the United States between eighteen and forty-five years of age, classified into the National Guard and Naval Militia and Unorganized Militia, and further provided for the drafting of a sufficient number of the unorganized militia into the service of the United States where there were not enough voluntary enlistments to keep the reserve battalions at the prescribed strength.

This conspiracy, if any was formed, cannot be brought forward and made to offend against the Conscription Act of May 18, 1917. The issue is whether the defendants did conspire to oppose by force and to prevent, hinder and delay the President of the United States in carrying out this resolution of Congress under the law as it existed at the time charged in this indictment and prior to the 18th day of May; and in considering this you will take into consideration all of the evidence which has been offered and admitted, and if you are convinced beyond a reasonable doubt that the object and purpose of the defendants was by force to prevent, hinder and delay the President in employing the entire naval and military forces of the United States in the prosecution of the war against the Imperial German Government as charged, then the defendants who participated in such conspiracy would be

guilty; and in this connection you will have in mind the power and authority to secure enlistments from the unorganized militia and the power to draft into the service of the United States from the unorganized militia a sufficient part to maintain the battalions at the proper strength.

If you believe or if you have reasonable doubt as to whether the "No Conscription" circular set out in the indictment and admitted in evidence did not purpose to oppose by force or incite others to oppose by force and hinder and delay the President in the execution of the joint resolution of Congress, then, of course, you will not consider it in that connection. But if you believe beyond a reasonable doubt that the purpose and effect of the circular was to incite others by force to oppose, hinder and delay the execution of such resolution, then such defendants who entered into such conspiracy would be guilty. In this connection I think I should say that the defendants are presumed to know the law and cannot shield themselves behind ignorance of the law. The law requires that all persons know what the law is. You are also instructed that every person is presumed to intend the natural consequences or results of his acts deliberately or knowingly done.

As stated, the indictment charges the defendants with conspiring to oppose by force the author-

ity of the United States, and to hinder and delay the execution of its laws. You are instructed that this is an element which must be established by the testimony on the part of the Government by the same degree of proof.

Force need not be actual physical force manifested by the defendants, but must be such conduct, either acts, statements, invitations or solicitations, the evident purpose of which is to incite others to the use of forcible resistance in hindering or delaying the Government of the United States in the execution of its laws. It is not essential that the object of the conspiracy should actually have been accomplished, or that force should actually have been used. Nor is it essential that the conspirators should have agreed upon the precise method of employing force or the weapons or instruments of such force. If a conspiracy was formed and the use of force was the natural or necessary means of accomplishing the object of the conspiracy, and if its use was necessarily incident to the carrying out of the plan of the conspiracy, whether that force should be used by the defendants or only by those persons who should be induced to co-operate with them, then the defendants would be guilty of the offense charged. Nor can the effect of the circular be neutralized or limited by any motive or purpose or intent not communicated with the circular. Nor could what Webster or

anyone else said enter into this issue or limit the effect of the circular, if the natural and reasonable conclusion to be deduced from the circular in evidence and what was done with it was to incite by force opposition to the law of the United States as charged. I think I should say in this connection, in view of the suggestions during the trial and argument, that you are not concerned in this case whether the war is right or not. We are at war now. There are only two sides to the war. One side is in favor of this country; the other side is against it. The policy of the Government has been declared and established, and no person can by force do anything that will hinder or delay the Government in carrying out that policy set out and defined in the resolution referred to in the indictment. The defendants are not charged with being against or in favor of the war, but with conspiracy by force to oppose, hinder or delay the Government of the United States in the execution of the resolution passed by the Congress with relation to the war and in carrying it to a successful termination. I think I should further say that Socialism or the Socialist party is not on trial in this cause; nor the Peace Society to which reference has been made in this trial, as such. The defendants have a right to belong to the Socialist party or to the Peace Society referred to, and to advocate the doctrines of those organizations by

lawful means; but they have no right under the name of either organization or under the guise of aiding other, or otherwise, to combine by force to hinder or delay the Government in the prosecution of the war. Nor is the mere fact, if such is established, of an innocent spectator at any meeting disclosed by the testimony where any matters were considered or discussed with relation to the circular or to any co-operation or conduct of any of the defendants or of the charges made, who did not participate in any of the proceedings or activity in carrying out the design and purpose of the scheme, if one was agreed upon—such parties, if there were such of the defendants, would not be guilty of the offense charged.

In this case, if you believe from the evidence or have a reasonable doubt as to whether the defendant Joe Pass or the defendant Sadler were mere innocent spectators and casual visitors at a meeting or meetings where the circular in evidence was considered and discussed and disposed of, and had no further interest or participation in the carrying out of any design or plan, if you find that one was agreed upon, and these parties or either of them did nothing to further the enterprise, such presence without any further interest or activity would not be sufficient to connect them with the conspiracy, if you find from the evidence one was formed by either

of the defendants. You will consider all of the evidence with relation to each of the defendants with a view of determining just what connection, if any, they had with the charge made, and the activity of each in forwarding the plan or scheme, if you find one was formed.

If you believe from the evidence that a conspiracy was formed by Wells or by Morris Pass or by Wells and others disclosed by the evidence, and that after the formation of this conspiracy the defendants Sadler and Pass, if they were not present at the meeting or not members of any confederation or conspiracy, if you find one was formed, but afterwards either or both joined such conspiracy with full knowledge of its purposes, then they would be as guilty as though they had been members of the conspiracy from the beginning.

In deliberating upon the charge in the indictment, you will take into consideration the law which was then in force as already defined to you, and the authority and direction given to the President of the United States by the Congress, and the testimony which has been offered and admitted as to what the defendants did, what they said, what effect what they did and what they said would have upon others in the relation disclosed by the testimony, having in mind the persons among whom the circular was distributed and the effect it would likely have upon such

persons as are disclosed by the evidence in this case. In this connection you are instructed that persons are not denied the right of petition, freedom of speech, or the right of peaceable assemblage. These are rights which are inalienable, and if exercised within the provisions of the law they can not be denied. The defendants had the right of freedom of speech and lawful assemblage and to petition Congress or to do anything to alleviate any grievances, so long as they did not advocate or advise or encourage the use of force in opposing, hindering or delaying the execution of the law of the United States as charged in the indictment. The defendant Wells had a right to address Dr. Strong's church, as testified to by one of the witnesses. He had a right to do or say anything in advocating the repeal of the law or its amendment, to write to Congressmen and to induce others to write to Congressmen, so long as he acted within the provisions of the law. But in this indictment he is charged with acting without the provisions of the law, and that is the issue which is now before you. All citizens are free to express their views on all public questions so long as they are actuated by honest purposes and not for the purpose of transgressing the rights of others, the laws of the state, or obstructing by force the execution of the laws of the United States; but no person has a right to convert the liberty of speech

into a license or to carry it to a point where it interferes with the due execution of the law, where his opposition is not honest, and where he is not actuated by an intention of expressing his views, but is manifested by an intent to violate the rights of others or the laws of the United States. A person may say or do anything not in itself unlawful to prevent the passage of a law or to secure the repeal of one already passed, but after a law is passed it is every man's duty to conform his acts in accordance with the provisions of the law, and he may not for the purpose of creating sentiment against the wisdom of the law do anything with intent to procure the violation of the law by force in his advocacy of its unwisdom or for the purpose of repeal.

The law with relation to the freedom of speech was recently commented upon by another judge (Judge Wolverton) which I fully approve. In referring to the constitution, he says:

"That instrument does declare that Congress shall make no law abridging freedom of speech. The guarantee is a blessing to the people of this Government, and great latitude is preserved to them in the exercise of that right. But a citizen may not use his tongue or his pen in such a way as to inflict legal injury upon his neighbor or another. Nor has any person the right, under the guarantee of freedom of speech, to shape his language in such a

way as to incite discord, riot, or rebellion, because such action leads to a breach of the peace, and disturbs good order and quietude in the community. Nor is he privileged to utter such language and sentiment as will lead to an infraction of law, for the laws of the land are designated to be observed, and not to be disregarded and overidden. Much less has he the privilege, no matter upon what claim or pretense, so to express himself, with wilful purpose, as to lead to the obstruction and resistance of the due execution of the laws of the country, or as will induce others to do so. A citizen is entitled to fairly criticise men and measures; that is, men in public office, whether of high or low degree, and laws and ordinances intended for the government of the people; even the constitution of his state or of the United States; this with a view, by the use of lawful means, to improve the public service, or to amend the laws by which he is governed, or to which he is subjected. But when his criticism extends, or leads by wilful intent, to the incitement of disorder and riot, or to the infraction of the laws of the land or the constitution of this country, or with wilful purpose, to the resistance and obstruction of the due execution of the laws by the proper authorities, it overleaps the bounds of all reasonable liberty accorded to him by the guarantee of the freedom of speech, and this because the very means adopted is an unlawful execise of his privilege."

In this case you will consider the guilt or innocence of each of the defendants separately with a view to determining their guilt or innocence, and the burden, as I have stated, is upon the Government to establish the material allegations of the charge in the indictment beyond a reasonable doubt.

The term "reasonable doubt" means in the law just what the words ordinarily imply. It means a doubt for which you can give a reason. It is such a doubt as a man of ordinary prudence, sensibility, and decision in determining an issue of like concern to himself as that before the jury to the defendants, which would make him pause or hesitate in arriving at his conclusion. But such a doubt should be entertained only from the want of such evidence to satisfy you beyond every reasonable doubt, or a doubt which is raised by the evidence itself, and should not be merely speculative, imaginary, or conjectural. A juror is satisfied beyond every reasonable doubt if from a candid consideration of the entire evidence which has been offered and admitted, direct and circumstantial, he has an abiding conviction of the truth of the charge made. When a juror is satisfied to a moral certainty of the guilt of the party charged, then he is satisfied beyond a reasonable doubt.

In this case in deliberating upon the evidence you will not search for reasons for acquittal nor

look for reasons for conviction. You will confine your deliberations solely to the evidence which has been admitted for your consideration, and this you will consider in the light of the in instructions given you, ignoring all other things and disregarding all prejudice, and give the issue fair, honest conscientious consideration with a view of determining what the truth is with relation to the charge made.

Evidence, as you may have inferred, is either direct and positive or presumptive and circumstantial. When a witness testified directly to the facts constituting a crime, the evidence is said to be direct and positive. When he testifies to facts and circumstances having only an indirect relation to the facts constituting the crime, the evidence is said to be presumptive and circumstantial. The commission of a crime may be proven by direct testimony,—that is, the testimony of persons who saw or heard,—or by circumstantial evidence. Circumstantial evidence is the proof of such facts and circumstances which interlock and dovetail into each other with relation to the defendants and the charge made as bears upon the guilt or innocence of the defendants, and if these are sufficient to establish the guilt of the defendants beyond every reasonable doubt, then this evidence is sufficient to sustain a convinction. But the circumstances should be of such character and should so relate to the offense charged as to

establish the guilt of the defendants beyond every reasonable doubt, and to exclude every reasonable hypothesis of innocence and every reasonable hypothesis except that of guilt.

Reference was frequently made during the trial and argument to the intent and purpose of the defendants with relation to the charge made. You are instructed that it is psychologically impossible to enter into the minds of the defendants and determine by practical demonstration the intent and purpose actuating the defendants. Acts sometimes speak louder than words and therefore the law requires that all of the circumstances detailed by the witnesses surrounding the charge made and the defendants with relation thereto be considered by the jurors. In determining the intent and purpose which actuated the defendants in the line of conduct disclosed, it is necessary to take into consideration what they did together with what they said, and from all the surrounding circumstances relating to the acts charged determine the intent and purpose which must have actuated the defendants in the line of conduct disclosed by the testimony,having in mind the statements, the acts, the demeanor, and the presumption of law that a person intends the natural consequences of his acts knowingly done. This presumption is not conclusive. It is of probatory character, and should be considered with all the other

elements disclosed by the testimony in this cause. In a case of this character the jury may find from the facts and circumstances, together with the language used and the natural, ordinary, and necessary consequences of the acts done, the intent actuating the defendants.

You, gentlemen of the jury, are the sole judges of the facts in this case and must determine what the facts in the case are. It has not been my purpose and it is not my purpose to refer to any facts in the case, or to intimate to you any opinion I may have of the facts. If I have referred in my instructions to any fact or have conveyed to you any opinion I have of the facts, I desire you to disregard it.

You are likewise the sole judges of the credibility of the witnesses who have testified before you. This must necessarily follow so as to enable you to pass upon the facts disclosed. In determining the weight or credit which you desire to attach to the testimony of any witness who has testified before you, you will take into consideration the demeanor of the witness upon the witness stand, the opportunity of the witness for knowing the things about which he has testified, the reasonableness or unreasonableness of the story of the witness, his interest of lack of interest in the result of this controversy, and from all these facts and circumstances de-

termine where, in your judgment, the truth in this case lies. If you find that any witness has wilfully sworn falsely as to any material fact or circumstance involved in this case, you have a right to disregard his entire testimony, except as the same may be corroborated by other credible evidence.

In this case upon the rebuttal by the Government the court admitted a transcript of testimony taken in New York which had been excluded before. This was admitted because objection was made as to the correctness of the report of what did transpire and that some parts of the examination had been eliminated or not reported, while the other side contended that everything contended for appeared in the transcript. Now, this was admitted only for the purpose of determining whether the story that appears in this testimony is complete and whether the testimony of the witness who says that he heard the testimony and transcribed it correctly is probably correct or whether the contention of the defendants is probably correct, if you find that to be material in your deliberations. You will not consider that with relation to, or for any other purpose in this case. The statements that you will consider in this case, made by the defendants, if you find that any were made, you will take from the mouths of the witnesses that testified before you together with the cross examination that was made by the other side

upon the trial, and consider all of the,—you will consider all of the testimony fairly with a view to determining as twelve honest men what the fact is.

From your decision upon the facts in this case there is no appeal. You are the final judges of the facts in this case, so that neither the defendants nor the Government can appeal from your finding upon the facts. I simply suggest that to impress you with the responsibility that rests upon you, that you may fully and carefully weight and consider all of the evidence that is before you.

It will require your entire number to agree upon a verdict; and when you have agreed upon a verdict you will cause the same to be signed by your foreman whom you will elect immediately upon retiring to the jury room.

There is just one other suggestion I desire to make, and that is this: Some reference was made in the trial, while no emphasis was placed upon it,—and I think I should say to you that being a conscientious objector to any law would not be any defense; and if, perchance, some of you may be impressed with the expression "conscientious objector," you will not give that any consideration in your deliberations in this case. Nor are you concerned with the penalty that is involved in this charge if a conviction should have been established. That is a matter which is not in your province; but that is

a matter which the law places elsewhere. You are just concerned with the facts in this case and nothing more."

The foregoing statement covers the court's entire instructions up to this point.

The court then inquired: "Are there any suggestions or corrections?"

Mr. Bell then replied: "In defining the essentials, you stated among other things that if they found the defendants conspired to hinder or delay the execution of a law of the United States, leaving out of that definition of the essentials one of the essential elements,—the element of force.

THE COURT: If I inadvertently omitted the term "force,"

MR. REAMES: It is in there.

MR. BELL: We don't agree. I don't take my suggestions from Mr. Reames. I am excepting.

THE COURT: I am telling you that if I omitted I will include now.

MR. BELL: I know Your Honor later referred to force, but in defining the essentials as I took it down at the time it was not included.

THE COURT: Very well.

MR. BELL: In the definition of force' the court told the jury that it need not be actual force. I take it that there could be no constructive force. In the face of this law, there is no such thing as

constructive force. We therefore except to that.

THE COURT: I stated that it was necessary for the defendants to use actual force.

MR. BELL: We except to that portion of Your Honor's charge wherein he charged the jury that knowledge of existing law or laws would be inferred on the part of the defendants as bearing upon the intent, for the reason that the matter of intent would be a matter of proof and not of inference. We except again to Your Honor's instruction on the question of freedom of speech, for the reason that the question of freedom of speech, is not involved in the issues in this case, and instructions in that particular would have a tendency to confuse the minds of the jurors; and particularly that part of the instructions wherein Your Honor spoke of inciting to riots and disorder. All the incitations to riots and disorder in the world would not bring the defendants within the charge in this particular case and within the charge in the indictment.

THE COURT (to the Jury): You are instructed that the reference to freedom of speech should only apply to this circular,—that "No Conscription" circular which has been offered in evidence. Any reference in the instruction with relation to inciting to riot was simply given as a general definition of the term so that you will understand it, and you will understand that the reference should only apply to

the charge in this indictment,—that is, the conspiracy to, by force, hinder and delay the Government as charged.

One form of verdict will be submitted. Some of the defendants are either guilty or not guilty. I mean that the defendants are either guilty or not guilty. Both counts are considered as one. You will simply write in the blank in the form after the name of each defendant the word "is" or "not," as you may conclude.

Mr. Bell's conference before arguments in which the court agreed to consider the instruction in the first case as offered, refused and exception allowed, took place while the jury was in the court room, and the exception noted to the instructions as given were taken in the presence of the jury before it retired to a consideration of the case.

Thereupon the jury retired to consider their verdict, and having returned into court a verdict of guilty against all, of the defendants upon both counts in the indictment, the court on the 18th day of March, A. D. 1918, entered its judgment and sentence upon the verdict, which already appears of record in said cause.

The foregoing Bill of Exceptions, which contains all of the matters and things heretofore allowed in defendants' original Bill of Exceptions together with all of the matters and things heretofore allow-

ed in the amendments thereto offered by the plaintiff in a separate document is hereby allowed, settled, certified and adopted as a true Bill of Exceptions in this cause in lieu of the said mentioned separate documents, to wit, Bill of Exceptions and Amendments thereto heretofore settled and allowed in this cause. And this said Bill of Exceptions as now settled, allowed and certified by the undersigned Judge of this Court, who presided at the trial of said cause, shall be and be deemed to be a Bill of Exceptions for purposes of the appellate record in said cause, the same to be filed and certified to the United States Circuit Court of Appeals.

The purpose of this Bill is to embody and set forth all of the matters and things contained in the original Bill and in the amendments thereto, so that the same may more clearly and concisely state all of the material facts in said cause, which do not appear fully of record save and except as they are contained in the two separate documents hereinbefore referred to, and this said Bill is duly certified, allowed, settled, and filed as and of the date of June 19th, 1918.

JEREMIAH NETERER
United States District Judge.

O. K. August 16, 1918.

CLARENCE L. REAMES
BEN L. MOORE

CERTIFICATE OF CLERK U. S. DISTRICT TO SUPPLEMENTAL TRANSCRIPT OF RECORD

United States of America,
Western District of Washington, ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct transcript of the Bill of Exceptions in the case of United States of America, plaintiff vs. Hulet M. Wells, Sam Sadler, Morris Pass and Joseph Pass, No. 3797 in said District Court, as the same was settled and certified by the Court under a Stipulation of the Attorneys for both sides entered into on the 16th day of August, 1918 and shown herein; and that the same constitutes a supplemental transcript of record upon the writ of error in said cause.

I further certify that the following is a full, true and correct statement of the expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff's in error for making this supplemental transcript and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's Fees (Sec. 828, R. S. U. S.) for record, and return, 284 fo. @ 15c............$42.60

Certificate of Clerk to transcript 3 fo.
@ 15c .... .45
Seal to said Certificate .... .20

ATTEST my hand and the seal of said District Court at Seattle, this 23 day of August, A. D. 1918.

(SEAL)

F. M. HARSHBERGER
Clerk.